TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, PETITIONER,

vs.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 21, 1946.

CERTIORARI GRANTED APRIL 7, 1947.

INDEX

	PAGE
Docket Entries	1
Complaint	2
Appearance and Answer	6
Stipulation of Facts	11
Supplement to Stipulation of Facts	28
Court's Conclusions of Law	39
Judgment	40
Notice of Appeal	41
Designation of Portions of Record to Be Printed On Appeal	42
Stipulation Re Comparison of Record	43
Order Extending Time for Filing Record and Docketing Appeal	44
Certificate of Clerk	45
Proceedings in U. S. C. C. A., Sixth Circuit	47
Minute entry of argument and submission	47
Judgment	47
Opinion, Miller, J.	48
Clerk's certificate	55
Order allowing certiorari	55

IN THE

United States District Court

Eastern District of Michigan

Southern Division

Civil Action—File No. 3302

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Plaintiff,

v.

JAMES F. MORRIS,
Defendant.

DOCKET ENTRIES

1942

1. March 26—Complaint filed.
2. March 26—Summons issued.
   April 8—Summons returned and filed.
3. April 20—Appearance and answer filed.
4. July 24—Stipulation of facts filed.
5. October 7—Supplemental stipulation of facts filed.

1945

6. September 26—Conclusions of law filed and entered. O'Brien, J.
7. September 26—Judgment dismissing complaint filed and entered. O'Brien, J.

8. December 6—Notice of appeal of plaintiff filed.
9. December 6—Stipulation re comparison of record filed.
10. December 6—Designation of portions of record filed.

1946

11. January 9—Order extending time for filing record and docketing appeal filed and entered. O'Brien, J.

COMPLAINT

(Filed March 26, 1942)

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 301 *et seq.*), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant resides at 20030 East River Road, Grosse Ile, Wayne County, Michigan, within the jurisdiction of this court, and is now, and at all times hereinafter mentioned was, the sole owner and operator of a place of business and truck terminal and garage located at 4151 West Jefferson Avenue in the City of Ecorse, Wayne County, Michigan, where he is engaged, under the name and style of J. F. Morris Cartage Co., in the transportation of steel and other metals by motor vehicle.

IV.

At all times hereinafter mentioned, defendant employed and is employing approximately 60 employees in and about his said place of business in Ecorse, Michigan, in the transportation of steel and other metals by motor vehicle and in processes and occupations necessary to such transportation. The steel and other metals transported by defendant's employees are produced by steel mills located in the State of Michigan, from raw materials, substantial quantities of which are purchased and transported in interstate commerce from and through States other than the State of Michigan to the said steel mills. Defendant's employees, in the course of their employment by defendant, transport by motor vehicle substantial quantities of the steel produced in said steel mills from the said mills to various automobile manufacturers and other customers located within the State of Michigan who purchase the said steel and other metals from the said steel mills. Substantially all of the said steel and other metals, after being transported by defendant's employees from the said steel mills to the said automobile manufacturers and other customers of the said mills, are further processed and fabricated into parts or ingredients of automobiles, machines and military equipment which are produced for interstate commerce and have been and are being sold, transported, shipped and delivered in interstate commerce from the said automobile plants, and other customers' places of business in the State of Michigan to, into and through States other than the State of Michigan. The employment of defendant's employees in transporting the steel and other metals in the manner aforesaid and in operations necessary thereto constitutes production of goods for interstate commerce within the meaning of Section 3(j) of the Act.

V.

During the period beginning October 24, 1938, the effective date of Section 7(a)(1) of the Act, and repeatedly thereafter through October 23, 1939, defendant employed many of his aforesaid employees, who were engaged in the

production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweek at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a)(2) of the Act, and repeatedly thereafter through October 23, 1940, defendant employed many of his aforesaid employees, who were engaged in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1940, the effective date of Section 7(a)(3) of the Act, and repeatedly thereafter, defendant has employed many of his aforesaid employees, who were engaged in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty (40) hours, and has failed and refused to compensate the said employees for their employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act.

VI.

During the period beginning on or about October 24, 1938, and repeatedly thereafter, defendant has transported, shipped and delivered, with knowledge that shipment, delivery, and sale thereof in interstate commerce from points within the State of Michigan, to, into and through other states was intended, goods produced by his said employees, in the production of which many of his employees were employed in violation of Section 7 of the Act as alleged in Paragraph V hereof. By transporting, shipping and delivering, with knowledge that shipment, delivery and sale thereof in interstate commerce, as aforesaid, was intended, the said goods so produced, defendant has violated and is violating the provisions of Section 15(a)(1) of the Act.

VII.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, his agents, servants, employees, and attorneys, and all persons acting or claiming to act in his behalf and interest, from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

WARNER W. GARDNER,
Solicitor,

ROY C. FRANK,
Assistant Solicitor,

A. A. COHEN,
Regional Attorney,

CHARLES A. REYNARD,
Attorney,

United States Department of Labor,
Attorneys for Plaintiff.

Post Office Address:
c/o Wage and Hour Division
U. S. Department of Labor
4090 Main Post Office Building
Cleveland, Ohio
or
c/o Wage and Hour Division
U. S. Department of Labor
Washington, D. C.

APPEARANCE AND ANSWER

(Filed April 20, 1942)

Now comes JAMES F. MORRIS, Defendant herein, and enters his Appearance in this cause by his Attorneys, MATHESON, DIXON & BRADY, and in Answer to the Complaint heretofore filed herein says:

I.

DENIALS

1. Answering Paragraph I of said Complaint, the Defendant admits the existence of the Fair Labor Standards Act of 1938 therein cited, hereinafter referred to in this Answer as the Act, but for reasons hereinafter set forth in this Answer the Defendant denies that he is chargeable with any alleged violation of the provisions of the Sections of the Act cited in said paragraph and accordingly denies that the Plaintiff is entitled to injunctive relief to enjoin the Defendant from future violation of the provisions of said cited Sections.

2. Answering the allegation set forth in Paragraph II of said Complaint, the Defendant admits that the Section of the Act therein cited confers jurisdiction upon the court in actions of this nature but, for reasons hereinafter set forth, denies that the provisions of said Section confers

jurisdiction on the court to grant injunctive relief against the Defendant in this proceeding.

3. Answering the allegations set forth in Paragraph III of said Complaint, the Defendant admits the allegations therein contained.

4. Answering the allegations set forth in Paragraph IV, the Defendant admits that during the periods mentioned in said Paragraph he employed approximately sixty employees engaged in transportation movements by motor vehicle between points located wholly in the State of Michigan, including, but not by way of limitation, the transportation of steel and other metals between steel mills located in said State and automobile manufacturers and other customers located within said State. With respect to the allegations therein contained as to transportation, processing, manufacture, sale, purchase, or other disposition of said steel and other metals prior to or subsequent to the possession of the same by the Defendant as a carrier thereof, the Defendant neither admits nor denies the allegations therein contained, having insufficient information upon which to form a belief, and leaves the Plaintiff to his proof. The Defendant denies that such employment by the Defendant and that such transportation operations by Defendant's employees constitutes production of goods for Interstate Commerce within the meaning of Section 3(j) of the Act on the ground that such allegation constitutes an erroneous conclusion of law based upon a faulty interpretation of the provisions of said cited Section as applied to the circumstances under which Defendant's business is conducted.

5. Answering the allegations set forth in Paragraph V of said Complaint, the Defendant admits that between October 24, 1938 and October 23, 1939 Defendant employed many of his employees for work-weeks longer than 44 hours; that between October 24, 1939 and October 23, 1940, Defendant employed many of his employees for work-weeks longer than 42 hours; that since October 24, 1940, Defendant has employed many of his employees for work-weeks longer than 40 hours.

Defendant denies all the other allegations contained in Paragraph V of the Complaint. In support of such denial Defendant will show that at all times mentioned in Paragraph V of said Complaint:

(a) Defendant's employees were paid an amount equal to and generally in excess of the minimum straight time wages prescribed by Section 6 of the Act for all hours employed during any work-week within the maximum hour provisions of Section 7(a) of the Act; and in addition thereto, said employees were paid for all overtime an amount equal to, and generally in excess of, one and a half times the straight time minimum wages prescribed by Section 6 of the Act for all hours of employment in any work-week beyond the maximum hours set forth in Section 7(a) of the Act, and/or

(b) Defendant's employees were compensated for their employment in excess of the hours specified in Section 7(a) of the Act at a rate not less than one and a half times the regular rate at which they were employed, as established by contract between the Defendant and such employees, and/or

(c) Some one or more of Defendant's employees were employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesmen and therefore within the exemptions provided in Section 13(a)(1) of the Act, and/or

(d) Some one or more of Defendant's employees were, by reason of their transportation duties and activities, employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to provisions of Section 204 of the Motor Carrier Act, 1935, and therefore within the exemptions established by Section 13(b)(1) of the Act, and/or

(e) Some one or more of Defendant's employees were engaged in transportation activities which placed them in the category of employees of an employer subject to the provisions of Part I of the Interstate Commerce Act and

therefore within the exemptions established by Section 13(b)(2) of the Act.

6. Answering the allegations contained in Paragraph VI of said Complaint, the Defendant denies the allegations therein contained and further denies the applicability of such allegations to the Defendant. In support of such denial, the Defendant alleges the fact to be that at all times mentioned in said Complaint, the Defendant was engaged in the transportation of property as a common carrier and that all of the property transported by the Defendant was tendered to him for transportation in commerce in the regular course of his business and that none of such property was produced by the Defendant or by his employees and that Defendant therefore falls within the express language of the exception set forth in Section 15 (a)(1) of the Act.

7. Answering the allegations contained in Paragraph VII of said Complaint, the Defendant, for all of the reasons hereinbefore set forth, denies that he has repeatedly violated the aforesaid provisions of the Act. The Defendant further denies that the Plaintiff is entitled to injunctive relief enjoining and restraining the Defendant from any threatened future violation of the Act on the ground that the facts and circumstances surrounding the Defendant's past operations do not show past violations of the Act for the reasons hereinbefore set forth, and on the further ground that the Complaint herein contains no allegations nor facts in support thereof to show that the Plaintiff has any reason to fear any future violation by the Defendant of the provisions of the Act; and on the further ground that said Complaint contains no allegation or facts in support thereof to show that the issuance of an injunction is necessary in order to prevent irreparable injury, a showing required by the provisions of Section 20 of the Clayton Anti-Trust Act, (38 Stat. 738 (1914), 29 U. S. C. Sec. 52 (1934)) as incorporated by reference in Section 17 of the Fair Labor Standards Act and as made a condition precedent to the exercise of the jurisdiction of this court pursuant to Section 17 of the Fair Labor Standards Act.

II.

Affirmative Defenses

1. Further answering said Bill of Complaint, the Defendant alleges by way of affirmative defense that if it shall be determined in this proceeding that it was the intent of Congress to make the provisions of the Act applicable to the transportation activities of the Defendant as they have in fact been conducted, then and in that event the Act is unconstitutional by reason of such application, because

(a) The Act impairs the right of contract between the Defendant and his employees contrary to the provisions of the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and/or

(b) The Act constitutes an attempt by Congress to exercise commerce powers beyond the scope of those delegated to Congress by the Constitution of the United States, particularly Article I, Section 8, Clause 3.

(c) The Act constitutes an attempt by Congress to exercise powers expressly reserved to the various States under the Tenth Amendment to the Constitution of the United States.

(d) The Act constitutes an attempt by Congress to delegate to the Administrator of the Wage and Hour Division, United States Department of Labor, power to enforce an Act which is in and of itself beyond the powers of Congress.

Wherefore, Defendant prays that an Order may be entered by this Honorable Court in his favor dismissing the within Complaint.

Matheson, Dixon & Brady,
By: (s) George S. Dixon,
Attorneys for Defendant.
2280 Penobscot Building,
Detroit, Michigan.

Dated: Detroit, Michigan,
April 20, 2942.

STIPULATION OF FACTS

(Filed July 24, 1942)

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that for the purpose of any hearing or determination of this cause the facts and exhibits hereinafter set forth shall be taken as true.

This stipulation is made subject to the right of either party to offer at any hearing hereof, which may be had or ordered, relevant and material evidence of other facts not inconsistent with those herein stipulated to be true.

I.

NATURE OF DEFENDANT'S BUSINESS

Defendant, James F. Morris, is now and for the past twelve years has been the sole owner and operator of the J. F. Morris Cartage Company, 4151 West Jefferson Avenue, Ecorse, Michigan, which is operated as a sole proprietorship. Defendant, operating under the name J. F. Morris Cartage Company, is engaged as a common carrier for hire in the local transportation of property by motor vehicle, his principal business consisting of the transportation of steel. These for hire transportation operations are conducted in and about the Metropolitan area of Detroit, Michigan, and at no time have the operations extended beyond the territorial limits of Wayne, Oakland and Macomb Counties, Michigan.

In the regular course of his business during the year 1941, defendant employed approximately 60 persons. Of this number approximately 40 were employed as truck drivers, 14 as mechanics, painters, washers and repairmen in the garage, 3 as dispatchers and 3 as general office workers.

During the same period the equipment operated by the defendant in the regular course of his business consisted of approximately 50 trucks or power units (sometimes referred to as "tractors") and 60 trailers of various types (including both two-wheel or semi-trailers and four-wheel trailers).

Defendant's operations are centralized at his main garage and yard at 4151 West Jefferson Avenue, Ecorse,

Michigan, which is used as a dispatching office, general maintenance and repair garage, and storage space for equipment when not in active use.

Although the defendant is engaged in a general cartage business and is prepared to render such service to the general shipping public, approximately ninety-seven (97) per cent of the total revenue derived by the defendant from such cartage services is received for cartage services performed by the defendant for the Great Lakes Steel Corporation or the Michigan Steel Corporation, both located in Ecorse, Michigan, and both being subsidiaries of the National Steel Corporation.

The defendant's cartage services fall principally into the following categories:

A. Approximately sixty (60) per cent of defendant's operations consists of the transportation of steel from the mills of the Great Lakes Steel Corporation and from the mills of the Michigan Steel Corporation at Ecorse, Michigan to plants of various automobile manufacturers and other industrial establishments in the Detroit Metropolitan Area.

B. Approximately thirty-five (35) per cent of the defendant's operations consists of the transportation of steel within the plant of the Great Lakes Steel Corporation from one mill or portion thereof to another, or within the plant of Michigan Steel Corporation from one mill or portion thereof to another, or between the mills of the Great Lakes Steel Corporation and the Michigan Steel Corporation. The steel transported from one mill or plant to another, is so transported for the purpose of further processing in the course of its manufacture prior to sale and shipment. An unsegregated portion of the steel so produced in the mills of the Great Lakes Steel Corporation and Michigan Steel Corporation is ultimately shipped directly or indirectly in interstate commerce. In these operations the defendant's trucks often operate within the plant and without leaving the plant for several days.

C. Approximately three (3) per cent of the defendant's operations consists of the transportation of freight between the plants of the Great Lakes Steel Corporation and the plants of the Michigan Steel Corporation on the one hand, and, on the other hand, interchange points, such as boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the defendant and such other interstate carriers. The defendant's compensation for his portion of the through transportation service is in some instances paid to him by the interstate carrier, the compensation representing a division of the through rates on the transportation movement, and other instances being compensated by the shipper.

D. Approximately one (1) per cent of the defendant's operations consists of the picking up of freight at various industrial establishments in the Detroit Metropolitan Area and the transportation of such freight to the plants of the Great Lakes Steel Corporation or the Michigan Steel Corporation.

E. Approximately one (1) per cent of the defendant's operations consists of the transportation of miscellaneous freight in general cartage service for hire and for shippers other than Great Lakes Steel Corporation or Michigan Steel Corporation. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D above, except that it is done on behalf of and for the account of shippers other than Great Lakes Steel Corporation and Michigan Steel Corporation.

Attached hereto and marked Exhibit "A" is a table of firms for whom the defendant performed cartage services

for hire during the year 1941, the relative percentage of total revenue represented by each account, and a description of the type of cartage performed. It is stipulated and agreed that Exhibit "A" shall be incorporated herein and made a part hereof.

II.

Interstate Commerce

As indicated in Paragraph I hereof, as well as in Exhibit "A", the principal consigning firms for whom defendant's employees transport steel are Great Lakes Steel Corporation and Michigan Steel Corporation. The steel so consigned during the year 1941 consisted principally of bumper stock, fender stock and other types of steel commonly used in the manufacture of automobiles and parts. The materials thus transported were consigned and delivered to various automobile and parts manufacturers and other industrial establishments in and about the City of Detroit, Michigan. Attached hereto and marked Exhibit "B" is a representative list of consignees to whom such goods were transported during the week ending February 8, 1941. It is stipulated and agreed that Exhibit "B" shall be incorporated herein, made a part hereof, and considered to be typical of the group of consignees to whom defendant's employees transported goods during the period between October 24, 1938, the effective date of the Act, to the date hereof.

During the period between October 24, 1938, the effective date of the Act, continuously to the date hereof, the greater part of the consignee firms listed in Exhibit "B" have been and are now engaged in the production of goods for interstate commerce, and the greater part of the fender stock, bumper stock and other steel products delivered to such consignees by defendant's employees has been and is now being used by such consignees in the production of automobiles, trucks, trailers, machinery and other goods, a substantial portion of which is sold and shipped in interstate commerce.

III.

Analysis of Operations

As indicated in Paragraph I hereof, defendant's drivers are engaged in five principal types of transportation (see Subparagraphs A, B, C, D, and E of Paragraph I).

Attached hereto and marked Exhibit "C" is a Record of Functional Activities, by Types of Trips, of Drivers of J. F. Morris Cartage Company for the year 1941. It is stipulated and agreed that Exhibit "C" shall be incorporated herein and made a part hereof. Exhibit "C" sets forth the name of each of defendant's employees who was employed as a truck driver for a period of eight or more weeks during the year 1941. Opposite the name of each driver is a series of columns for each workweek during the year 1941.

In the first of these columns, designated "Total Trips", there is recorded in black type the total number of trips of all types which that driver made during the week. In the second column, designated "Pickup Trips", there are recorded in red type all trips of the character described in Subparagraphs C or E of Paragraph I hereof which involved movements of goods to or from railroad freight houses or line haul motor carrier depots. In the third column designated "Boat Dock Trips", (which appears only during the navigation season) there are recorded in blue type all trips of the character described in Subparagraphs C or E of Paragraph I hereof, which involved movements of goods to or from the boat docks of the several steamship companies in the City of Detroit, Michigan.

An examination of the totals for all drivers for all weeks discloses that pickup trips and boat dock trips constitute but a small portion of defendant's total business. Of a total of 19,786 trips of all types, 464 or 2.34 per cent were pickup trips, 260 or 1.31 per cent were boat dock trips, with the remaining 19,062 or 96.35 per cent representing interplant movements, of the types described in Subparagraphs A, B and D of Paragraph I.

Two analyses of Exhibit "C" have been prepared which are attached hereto and marked Exhibits "C-1" and "C-2".

It is hereby stipulated and agreed that Exhibits "C-1" and "C-2" are incorporated herein and made a part hereof.

Exhibit "C-1" is a Recapitulation of Exhibit "C" showing Percentage of Employees, by Weeks, Exclusively Engaged in Interplant Transportation. An examination of Exhibit "C-1" discloses that in the average workweek throughout the entire year 1941, 75.6 per cent of the drivers were exclusively engaged in interplant trips of the types described in Subparagraphs A, B, and D of Paragraph I. The remaining 24.4 per cent of the drivers in the average workweek during the year 1941 made one or more pickup or boatdock trips (or both).

Exhibit "C-2" is a Recapitulation of Exhibit "C" showing Percentage of Weeks, By Employees, in Which the Latter Were Exclusively Engaged in Interplant Transportation (of the types described in Subparagraphs A, B and D of Paragraph I).

An examination of Exhibit "C-2" discloses that the "average employee" was exclusively engaged in interplant transportation during 75.6 per cent of the workweeks in 1941. Two employees (W. Armbruster and J. Wineinger) were exclusively engaged in interplant hauling during the full period of their employment in the year 1941.

With the exception of but two other employees (W. Chase and L. Ruby) all of defendant's drivers were exclusively engaged in interplant hauling during the greater part (50 per cent or more) of the workweeks in the year 1941.

IV.

Wages and Hours of Employment

Each of the three of defendant's office employees is employed on a weekly salary basis and is compensated at a rate in excess of that required to be paid by Section 6 of the Act. None of these three office employees has ever worked in excess of the maximum number of hours prescribed in Section 7 in any workweek thereby entitling him to any overtime compensation.

Each of the three dispatchers employed by the defendant is employed on an hourly rate basis of ninety-one cents

an hour and is paid only straight time at such hourly rate regardless of the number of hours worked each week. Each of these dispatchers has been employed for a number of hours in excess of the number provided by Section 7 of the Act during substantially all of the workweeks since October 24, 1938, the effective date of the Act, without receiving any compensation in excess of his regular hourly rate for such overtime employment. In an average week each dispatcher earns $43.28. In those workweeks in which a dispatcher is employed for a period of 32 hours or less, he is compensated for his services only at straight time at his regular hourly rate of pay which results in his receiving less than $30.00 per week. Each dispatcher, during the period that he is on duty, has full authority over all drivers with power to hire or discharge drivers and to make determinative representations concerning their employment.

Each of the mechanics and laborers, employed by defendant in and about his garage or yard, with the exception of Herbert E. Smith, employed as defendant's Superintendent of Maintenance, is employed on an hourly rate basis and is paid only straight time at such hourly rate regardless of the number of hours worked each week. Employee Herbert E. Smith is paid a straight weekly wage of $60.00 regardless of the number of hours worked and the said Smith has been employed for a number of hours in excess of the number provided in Section 7 of the Act during substantially all of the workweeks since October 24, 1938, the effective date of the Act, without receiving any compensation in excess of his regular weekly salary of $60.00 per week. Herbert Smith, in the normal course of his employment as Superintendent of Maintenance, has full authority over all mechanics and laborers with power to hire or discharge such employees and to make determinative representations concerning their employment. The said Smith, who works the same schedule of hours as the other mechanics and laborers, devotes approximately twenty-five (25) per cent of his time to the performance of routine physical tasks of the same general character as that of the employees working under his direction and

supervision. All other mechanics and laborers have been employed for a number of hours in excess of the number provided in Section 7 of the Act during substantially all of the workweeks since October 24, 1938, the effective date of the Act, without receiving any compensation in excess of their regular hourly rates for such overtime employment.

During the period between October 24, 1938 and August 1, 1940, each of defendant's drivers was employed on an hourly rate basis and was paid straight time at such hourly rate regardless of the number of hours worked each week. All of such drivers were employed for a number of hours in excess of the number provided in Section 7 of the Act during substantially all of the workweeks between October 24, 1938 and August 1, 1940 without receiving any compensation in excess of their regular hourly rates for such overtime employment.

During the period between August 1, 1940 and August 1, 1941, defendant's drivers were employed pursuant to the terms of a collective bargaining agreement. Said agreement provided for employment on an hourly rate basis with straight time compensation for the first 52 hours of employment with overtime compensation at one and one-half times such hourly rate for all hours in excess of 52 in each workweek. All of defendant's drivers were employed for a number of hours in excess of the number provided in Section 7 of the Act during substantially all of the workweeks in the said period without receiving overtime compensation in excess of their regular hourly rates unless and until they had been employed in excess of the 52-hour limit provided by said collective bargaining agreement.

During the period between August 1, 1941 and the date hereof, defendant's drivers have continued to be employed pursuant to the provisions of said collective bargaining agreement, although the terms thereof have, since the date mentioned, been revised so as to increase the said hourly rates and extend the workweek to 54 hours, after which overtime compensation has been paid. All of defendant's drivers have been employed for a number of hours in excess of the number provided in Section 7 of

the Act during substantially all of the workweeks in the said period without receiving overtime compensation in excess of their regular hourly rates unless and until they have been employed in excess of the 54-hour limit provided by said collective bargaining agreement.

The collective bargaining agreements referred to in the last two preceding paragraphs are union contracts which were in full force in the Detroit Metropolitan Area during the period indicated and covered all union drivers engaged in general cartage operations within the Detroit Metropolitan Area, whether employed by companies engaged exclusively in a general cartage business in competition with the defendant, or employed to perform cartage operations in competition with those operations conducted by the defendant by motor carriers engaged in line-haul freight transportation in interstate commerce under the provisions of the Motor Carrier Act, 1935, Part II, Interstate Commerce Act. During the entire period from October 24, 1938 to the date hereof defendant has paid his drivers on an hourly wage basis equal to the union scale met by all carriers engaged in general cartage operations in the Detroit Metropolitan Area.

APPROVED:

A. A. COHEN,
Regional Attorney,

CHARLES A. REYNARD,
Attorney,

United States Department of Labor,
Attorneys for Plaintiff.

MATHESON, DIXON & BRADY,
By GEORGE S. DIXON,
Attorneys for Defendant.

EXHIBIT "A"

TABLE OF CONSIGNING FIRMS FOR WHOM J. F. MORRIS CARTAGE COMPANY PERFORMED SERVICES DURING 1941, AND THE CHARGES MADE FOR SUCH SERVICES.*

*Source: Accounts Receivable Ledger of J. F. Morris Cartage Co.

ACCOUNT		CHARGES	PERCENTAGE OF TOTAL CHARGES
Great Lakes Steel Outgoing	(1)	$126,570.08	48.551
Great Lakes Transfers	(2)	20,107.38	7.713
Great Lakes Pickups	(3)	3,578.30	1.373
Great Lakes Intermill	(4)	69,171.84	26.533
Michigan Steel Outgoing	(1)	28,518.96	10.939
Michigan Steel Transfers	(2)	1,337.37	.513
Michigan Steel Pickups	(3)	355.81	.136
Michigan Steel Intermill	(4)	2,494.31	.957
Miscellaneous	(5)	8,561.31	3.285
Totals		$260,695.36	100.000

(1) These accounts consist principally of shipments of the type described in Subparagraph A of Paragraph I. Also included however are some charges for shipments of the type described in Subparagraph C of Paragraph I.

(2) These accounts represent transportation of the type described in Subparagraph B of Paragraph I.

(3) These accounts represent shipments of the type described in Subparagraphs C and D of Paragraph I.

(4) These accounts represent shipments of the type described in Subparagraph B of Paragraph I.

(5) In addition to the 8 specific accounts set forth in the above table, representing 96.715 per cent of the total business transacted in 1941, the J. F. Morris Cartage Company also performed services for ap-

proximately 45 additional firms, representing the remaining 3.285 per cent of the 1941 business. Such cartage consisted of the types described in Subparagraphs C, D, and E of Paragraph I.

EXHIBIT "B"

REPRESENTATIVE LIST OF CONSIGNEES TO WHOM J. F. MORRIS CARTAGE COMPANY DRIVERS TRANSPORT STEEL FROM THE MILLS OF THE GREAT LAKES STEEL CORP.

(This is only a partial list and the names entered herein were taken at random from the time cards for the week ending February 8, 1941.)

Thompson Products Co.
7881 Conant

H. B. Hamburger & Co.
4000 Beaufait

Todd Steel Corp.
15443 Second Blvd.

Detroit Moulding Div.
L. A. Young Spring & Wire Corp.
1601 Clay

National Sheet Steel Co.
13000 Lyndon

Peerless Steel Products Co.
4201 Cabot

Standard Tube Co.
14600 Woodward

Garland Mfg. Co.
10533 Gratiot

Rotary Electric Steel Co.
21400 Mound

Kelsey-Hayes Wheel Co. (Military Rd. plant)
3600 Military

DeSoto Division—Chrysler Corp.
6000 Wyoming

Motor Products Corp.
11801 Mack

E. G. Budd Mfg. Co.
12141 Charlevoix

Buhl Stamping Co.
2730 Scotten

Rycenga Mfg. Co.
245 Adair

Briggs Mfg. Co. (8 Mile Rd. plant)
6450 E. Eight Mile Road

Whitehead Stamping Co.
1661 W. LaFayette

Hudson Motor Car Co.
12601 E. Jefferson

Clayton & Lambert Mfg. Co
11111 French Road

Fruehauf Trailer Co.
10940 Harper

Stanton Steel Co.
24647 Sherwood, Centerline

Motors Metal Mfg. Co.
5936 Milford

Dodge Bros. Corp. (main plant)
7900 Jos. Campau, Hamtramck

Chevrolet (No. 3 plant) Motor Div.
General Motors Corp.
1840 Holbrook

Solvay Process Co.
W. Jefferson & Solvay

Chrysler Corp.
341 Massachusetts

Consumers Steel Products Corp.
6450 E. McNichols

Kelsey-Hayes Wheel Co. (McGraw Rd. Plant)
6100 McGraw

Transportation Engineers Inc.
1957 W. Lafayette

Peninsular Metal Products Corp.
6635 E. Forest

Stamping Plant of DeSoto Div.—Chrysler Corp.
6600 Wyoming

Ternstedt Mfg. Co.
6307 W. Fort

Stenger Bumper & Mfg. Co.
153 Sears, Highland Park

Voisine Steel Co.
2423 McKinstry

Briggs Mfg. Co. (Mack Avenue plant)
11631 Mack

Whitehead & Kales Co.
58 Haltiner, River Rouge

Packard Motor Car Co.
1580 E. Grand Blvd.

Richards Bros. Div.—Allied Products Corp.
1560 E. Milwaukee

General Spring & Bumper Div.
Houdaille-Hershey Corp.
2660 E. Grand Blvd.

Fisher Body Co. (Fleetwood Plant)
West Fort & West Second

Detroit Lubricator Co.
5900 Trumbull

Ford Motor Co. (Rouge Plant)
3674 Schaefer Rd.
Dearborn

Bowen Products Corp.
4647—4th, Ecorse

Electro Master Inc.
1801 E. Atwater

EXHIBIT "C-1"

RECAPITULATION OF EXHIBIT "C" SHOWING PERCENTAGE OF EMPLOYEES BY WEEKS, EXCLUSIVELY ENGAGED IN INTERPLANT TRANSPORTATION

Week Ending 1941		Total Drivers Employed	Drivers Making Pickup Trips**	Drivers Making Boat Dock Trips**	Drivers Making Pickup & Boat Dock Trips	Drivers Engaged Exclusively in Interplant Transportation*	
						Number	Percent
Jan.	4	39	8	—	—	31	79.5
	11	38	8	—	—	30	78.9
	18	37	4	—	—	33	89.1
	25	38	8	—	—	30	78.9
Feb.	1	38	4	—	—	34	89.5
	8	39	7	—	—	32	82.1
	15	38	6	—	—	32	84.2
	22	40	11	—	—	29	72.5
Mar.	1	41	6	—	—	35	85.4
	8	42	4	—	—	38	90.5
	15	42	5	—	—	37	88.1
	22	42	3	—	—	39	92.9
	29	41	5	—	—	36	87.8
Apr.	5	40	4	—	—	36	90.0
	12	42	1	—	—	41	97.6
	19	41	3	—	—	38	92.7
	26	40	5	—	—	35	87.5
May	3	39	4	—	—	35	89.7
	10	41	5	—	—	36	87.8
	17	36	4	—	—	32	88.9
	24	40	5	5	1	29	72.5
	31	39	4	8	1	26	66.7
June	7	40	3	—	—	37	92.5
	14	40	4	3	—	33	82.5
	21	41	7	1	—	33	80.5
	28	38	5	—	—	33	86.8

Week Ending 1941	Total Drivers Employed	Drivers Making Pickup Trips**	Drivers Making Boat Dock Trips**	Drivers Making Pickup & Boat Dock Trips	Drivers Engaged Exclusively in Interplant Transportation* Number	Percent
July 5	37	3	—	—	34	91.9
12	38	4	—	—	34	89.5
19	39	4	—	—	35	89.7
26	38	4	—	—	34	89.5
Aug. 2	37	5	—	—	32	86.5
9	35	10	3	—	22	62.9
16	35	2	10	—	23	65.7
23	36	1	4	—	31	86.1
30	33	8	4	2	19	57.6
Sept. 6	34	2	8	4	20	58.8
13	33	4	10	3	16	48.5
20	32	3	10	2	17	53.1
27	32	5	18	2	7	21.9
Oct. 4	32	9	8	1	14	43.8
11	32	3	10	7	12	37.5
18	32	3	5	2	22	68.8
25	24	5	2	1	16	66.7
Nov. 1	33	8	7	6	12	36.4
8	33	6	9	—	18	54.5
15	33	4	7	5	17	51.5
22	30	4	4	3	19	63.3
29	33	7	14	1	11	33.3
Dec. 6	33	10	—	—	23	69.7
13	32	11	—	—	21	65.6
20	34	11	—	—	23	67.6
27	31	5	—	—	26	63.9
Totals	1903	274	150	41	1438	75.6

* As used here "Interplant Transportation" refers to those types described in subparagraphs A, B and D of Paragraph I of the Stipulation.

** As used here "Pickup Trips" and "Boat Dock Trips" refer to transportation of the type described in Subparagraph C of Paragraph I of the stipulation.

EXHIBIT "C-2"

RECAPITULATION OF EXHIBIT "C" SHOWING PERCENTAGE OF WEEKS, BY EMPLOYEES, IN WHICH THE LATTER WERE EXCLUSIVELY ENGAGED IN INTERPLANT TRANSPORTATION

Driver's Name	Total Weeks Worked (1941)	Pickup Weeks**	Boat Dock Weeks**	Pickup and Boat Dock Weeks	Weeks Exclusively Engaged in Interplant Transportation*	
					Number	Percent
E. Allmon	51	5	7	—	39	76.5
F. Armbruster	45	20	—	2	23	51.1
W. Armbruster	25	—	—	—	25	100.0
L. Baker	52	4	8	2	28	73.1
R. Becker	52	10	5	1	36	69.2
L. Broughton	51	—	1	—	50	98.0
W. Chase	51	25	2	—	24	47.1
E. Curry	15	2	1	—	12	80.0
C. Decker	33	4	2	—	27	81.8
A. Earley	48	9	3	—	36	75.0
L. Earley	49	2	7	1	39	79.6
E. Fall	52	—	3	—	49	94.2
C. Fude	52	11	6	1	34	65.4
L. Gee	51	2	1	—	48	94.1
J. Gorman	51	8	4	3	36	70.6
B. Hanson	52	2	9	3	38	73.1
T. Jacks	52	14	2	1	35	67.3
F. Kittle	33	11	1	—	21	63.6
W. Klear	50	7	4	—	39	78.0
E. Knapp	38	6	1	1	30	78.9
D. Kramer	51	12	3	3	33	64.7
D. Labadie	36	7	2	—	27	75.0
E. Lafnear	11	1	—	—	10	90.9
A. McCurry	28	—	2	—	26	92.9
G. Nelton	51	8	1	—	42	82.4
J. Mesie	52	—	9	1	42	80.8
R. Morris	33	6	—	—	27	81.8
O. Navarre	50	7	6	5	32	64.0

Driver's Name	Total Weeks Worked (1941)	Pickup Weeks**	Boat Dock Weeks**	Pickup and Boat Dock Weeks	Weeks Exclusively Engaged in Interplant Transportation*	
					Number	Percent
F. Powers	50	—	2	—	48	96.0
M. Preston	52	1	4	—	47	90.4
M. Riopelle	48	5	4	1	38	79.2
L. Ruby	51	29	—	—	22	43.1
A. Schwartz	52	2	12	2	36	69.2
W. Schwartz	52	3	7	1	41	78.8
N. Scott	52	4	4	4	40	76.9
E. Seneski	51	5	3	3	40	78.4
J. Smiga	49	7	4	2	36	73.5
F. Strini	51	3	8	2	38	74.5
B. Trew	22	1	—	—	21	95.5
A. Vallie	51	11	6	—	34	66.7
E. Wilkins	45	12	6	2	25	55.6
J. Wineinger	28	—	—	—	28	100.0
B. Young	34	8	—	—	26	76.5
Totals	1903	274	150	41	1438	75.6

* As used here, "Interplant Transportation" refers to those types described in subparagraphs A, B and D of Paragraph I of the Stipulation.

** As used here, the terms "Pickup Weeks" and Boat Dock Weeks" refer to weeks in which the driver was engaged in transportation of the type described in Subparagraph C of Paragraph I of the Stipulation.

SUPPLEMENT TO STIPULATION OF FACTS UNION CONTRACTS EXHIBIT "D"

(Filed October 7, 1942)

It is hereby stipulated and agreed by and between the Parties hereto, by their respective attorneys, that the photostatic documents attached hereto and marked respectively Exhibit "D-1", "D-2", and "D-3" constitute the collective bargaining agreements referred to on pages 9 and 10 of the Stipulation of Facts heretofore filed in the above entitled cause and shall be considered in connection with said Stipulation of Facts as supplementary thereto and a part thereof.

Exhibit "D-1" is a four page agreement between J. F. Morris Cartage Company and Truck Drivers' Union Local No. 299, Detroit, Michigan, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, effective August 1, 1940 to continue in full force and effect until July 1, 1942.

Exhibit "D-2" is a two page letter dated August 13, 1941 modifying said agreement signed by James R. Hoffa, indicating acceptance by the Union and signed by James F. Morris indicating acceptance by J. F. Morris Cartage Company.

Exhibit "D-3" is a two page letter dated August 26, 1941 further modifying said agreement and signed by same parties indicating acceptance by the Union and by said employer.

It is further stipulated and agreed by and between the Parties hereto, by their respective attorneys, that Exhibits "D-1", "D-2", and "D-3" attached hereto constitute the terms of the collective bargaining agreement pursuant to which all of defendant's drivers were employed during the period between August 1, 1940 and the date of the Stipulation of Facts heretofore filed in the above cause and that said collective bargaining agreement also covered all Union drivers engaged during the same period in general cartage operations within the Detroit Metropolitan area, whether employed by companies engaged

exclusively in a general cartage business in competition with the defendant, or employed to perform cartage operations in competition with those operations conducted by the defendant by motor carriers engaged in line-haul freight transportation in interstate commerce under the provisions of the Motor Carrier Act, 1935, Part II Interstate Commerce Act.

Dated: September 28th, 1942.

Approved:

(s) CHARLES A. REYNARD,
Regional Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

(s) MATHESON, DIXON & BRADY,
By. (s) GEORGE S. DIXON,
Attorneys for Defendant.

EXHIBIT "D-1"

AGREEMENT

THIS AGREEMENT made and entered into by and between J. F. MORRIS CARTAGE Co., hereinafter referred to as Company, party of the first part, and Truck Drivers Union Local No. 299, Detroit, Michigan, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, hereinafter referred to as "Union", party of the second part.

WITNESSETH:

WHEREAS, the company is engaged in local cartage and/or over-the-road hauls in intrastate and interstate transportation of freight by motor vehicle in, from and between Metropolitan Detroit, Michigan, and

WHEREAS, the Union is a voluntary labor organization composed of men employed in the trucking industry as highway drivers, city drivers, drivers' helpers, dock workers, checkers and freight handlers, some of whom are employed by the company, and

WHEREAS, the said Company and the said Union acting by their duly authorized representatives in conference, and after due consideration of the matters herein stated, hereby agree as follows:

ARTICLE I.

RECOGNITION

The Company agrees to employ only members in good standing in Local Union No. 299, it being understood and agreed that whether any employee is a member in good standing in said Union shall be determined exclusively and solely by the Union, provided, however, in the event the Union is unable to furnish qualified (acceptable to the company) men in good standing, the company may employ non-union men, provided however, such non-union men become members of Local Union No. 299 within thirty (30) days from commencement of employment.

ARTICLE II.

WAGE SCALE AND CONDITIONS

(a) Parties to this agreement agree that in no case shall any scale of wages be less than provided herein. Provided, however, that the signing of this agreement shall in no way affect the present wage scale if such scale is higher than provided in this agreement.

(b) The minimum wage scale for local deliveries shall be as follows:

1/2 ton pickups used in messenger service only	70c	per hour
Straight jobs and semis (Until January 1, 1941 and 80c per hour for the balance of the agreement.)	77½c	per hour
Double bottoms (Until January 1, 1941 and 85c per hour for the balance of the agreement.)	82½c	per hour
Dockmen	60c	per hour
Checkers	67½c	per hour

The regular week's work shall consist of fifty-two (52) accumulated hours. All hours worked in excess of fifty-two (52) hours in any one week shall be paid at the rate of time and one-half (1½) the regular hourly rate established in this agreement.

(c) There shall be a time clock installed in every company where 25 or more Local No. 299 members are employed. When the driver or member-employee is called and reports for work; time shall commence when said employee reports for duty, and in no case shall said employee receive less than three (3) hours' pay for reporting for duty.

(d) In the event the companies under the jurisdiction of Local No. 299 should contract work under the jurisdiction of other Local Unions and the rate of pay established by such Local Unions is higher than the rate of pay in this contract, the higher rate of pay shall prevail for such work actually performed.

(e) It is further agreed by and between the parties hereto that in the event the company leases equipment from individual owners, then and in that event the company shall pay the driver directly and separately from the lessor of said equipment. It is further agreed that should it become necessary for the company to hire extra equipment, only Union drivers shall be allowed to drive same.

(f) Seniority: In case of reduction in force the Union members longest in the service of the company shall be retained and the members youngest in the service shall be laid off. The seniority list must be posted where it will be accessible to the members of the Union at all times. The Union agrees, however, that the application of this paragraph to all local cartage companies shall be subject to individual treatment and consideration of the application of such seniority rule.

ARTICLE III.

General Provisions

1. The Union, as well as the employee members thereof,

agree at all times as fully as it can be in their power, to further the interests of the said industry and of the respective company.

2. Drivers shall not perform pickup or delivery service or handle freight beyond thirty (30) feet from tail gate of vehicle. This applies only to premises of consignee or consignor.

3. Members of the Union shall report, immediately, to the company in writing, all defects in equipment and all accidents and the names and addresses of all witnesses to accidents.

4. The company shall not require members of the Union to take out on the streets or highways any vehicle not equipped with the safety appliances required by law, or any vehicle not in a safe operating condition.

5. When the occasion arises where a driver gives written report on forms in use by the company of a vehicle being in an unsafe operating condition and receives no consideration from the company, then he shall take the matter up with the officers of the Union who shall take the matter up with the company.

6. No member of the Union shall be responsible for loss or damage done to the vehicle operated by him or to the merchandise under his charge, unless same resulted from the negligence of such member.

7. Any rule of the company requiring physical or mental examination shall be promptly complied with by the members of the Union, provided, however, that such medical fees are paid by the company.

8. It is understood and agreed that should it subsequently be determined that members of the local cartage association or the members of the Local Union come under the provisions of the Fair Labor Standard Act or any similar legislation enacted in the State of Michigan, then as to such members any provisions of this contract that do not comply with the requirements of said Act are to be changed so that there is no violation of the statutes, provided, however, that such changes shall not result in any

substantial penalties to members of the Union or the company.

9. Violations on the part of the employee member of the Union of the rules and regulations of the Union and/or the company, or his or its insurance company, or violation of the rules and regulations provided by the municipal, state, or federal law or authority, as related to motor transportation or to general conduct, or unnecessary delay in the transportation of freight, or any employee's dishonesty, carelessness, or incompetency, shall be considered cause for disciplinary action on the part of the company and shall subject the employee to temporary or permanent dismissal from employment.

10. It is mutually agreed that it is the intent of both parties hereto that each and every company engaged in transportation covered by this agreement shall be bound by the same and identical terms as provided herein and that should the Union at any time hereafter during the life of this agreement, allow any carrier a lower wage scale or any other concession lower than the standards established by this agreement, then such lower scale or other concessions shall automatically be adopted and become a part of this agreement so that all carriers can obtain the benefits automatically without amending or endorsing any part of this agreement affecting such changed wage scale or other concessions.

ARTICLE IV.

Steward and Dues.

1. The company shall recognize the right of the employees to appoint or elect a steward at each terminal, the duties of such steward in no way conflicting with his regular duties.

2. The company further agrees to honor all written or signed orders of employees for payment of application fees or union dues, presented by the Union members, and deduct the amount stated thereon from the wages of such member of the Union and pay the same over to the Union.

ARTICLE V.

Adjustment of Grievances

It is mutually agreed that should any differences arise between the company and the Union or its members, including disagreements as to the meaning and application of the provisions of this agreement, there shall be no strikes, tie-up of equipment, walk-outs or any cessation of work on the part of the Union and its members, nor shall the company use any method of a lock-out until the parties hereto first attempt to settle their differences or grievances in the following manner:

(a) All grievances of employee members must be reported in writing to officers or persons designated by the Union if such grievances are not satisfactorily adjusted by the company. The Union representatives shall present the written complaint to the company and every effort shall be made to settle same.

(b) Arbitration of any major grievance which cannot be settled by the Union and the company must be submitted in writing to a joint meeting of representatives of Local Union No. 299 and the Employers' Joint Labor Relations Committee, which latter committee the company hereby recognizes as its representative and agent in settling labor disputes and/or grievances which may arise.

(c) In the event the dispute shall not have been satisfactorily settled by any of the above methods, then the matter shall be appealed to three (3) arbitrators, one (1) appointed by the Employers' Joint Labor Relations Committee and (1) appointed by Local Union No. 299 and the two choosing a third disinterested party as the third member and all findings of such board are to be final.

(d) In the event that any employee is discharged for any reason other than dishonesty or intoxication, he shall have a hearing within twenty-four (24) hours. If after the hearing the man is reinstated, he shall be compensated for all time lost. The amount of compensation to be decided by the Arbitration Board.

This Agreement shall become effective this 1st day of

August, A. D., 1940, and continue in full force and effect until the 1st day of July, A. D. 1942.

IN WITNESS WHEREOF the parties hereto have hereunder set their hands and seals the day and date first above written.

COMPANY

J. F. MORRIS CARTAGE CO.,
By J. F. MORRIS

UNION

LOCAL UNION NO. 299,
By: R. J. BENNETT,
J. S. LYLE.

EXHIBIT "D-2"

August 13, 1941

MEMORANDUM

OFFICE OF PRODUCTION MANAGEMENT
SOCIAL SECURITY BUILDING
WASHINGTON, D. C.

Mr. James Hoffa
Local Union 299
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
and Workers of America
1500 West Fort Street
Detroit, Michigan

Mr. R. B. Godfredson, Chairman
Local Cartage Negotiating Committee
751 - 15th Street
Detroit, Michigan

Re: Greater Detroit Local Cartage Labor Matter.

Gentlemen:

After considerable analysis of the labor controversy in the Greater Detroit area and all matters pertaining there-

to, particularly the ability of employers to meet the Union's demand for increased wages effecting local cartage, this office has come to the conclusion that without disturbing any of the existing contracts between the local union and the operators that both parties, because of the national emergency and particularly because of the importance of the Greater Detroit area in our defense program, agree with me, as representative of the Office of Production Management, work under the following terms during the existence of the emergency. It being specifically understood that as a recommendation to take care of an emergency situation, that should such national emergency terminate and be declared to be at an end by this office, that the terms and conditions contained herein shall automatically terminate and all parties revert to their rights under written agreement of August 1, 1940; provided, however, that in no case shall the terms of this recommended memorandum be effective after December 31, 1942.

Both employers and Local 299 agree with the Office of Production Management that:

1. There shall be no stoppage of work due to the urgent and serious emergency existing.

2. That the operators grant to members of Local 299 a six cent (6c) per hour increase for each and every class of employees described in their agreement now existing between both parties.

3. In order to allow the operators to meet the added burden which they assume because of extreme emergency of national defense, this office recommends that the hours of service be increased four (4) hours per week.

4. That the above conditions being solely for the period of the emergency that an emergency expiration date to the present contract existing between the parties be accepted by both parties, namely, from August 1, 1941, to December 31, 1942, it being specifically understood and agreed that should the emergency period be declared at an end by this office, that these provisions and conditions, as agreed with by our office, be automatically terminated and the rights of

the parties shall revert to the terms of the original agreement.

I am sure that both of you realize the seriousness of our present conditions and will do everything in your power to convince your respective membership that your agreement with our office under this proposal will not only be accepted, but faithfully carried out and performed.

Very truly yours,

GEORGE PLAMBECK.

Accepted by the Union:

JAMES R. HOFFA
Signature.

Accepted by the Employer:

J. F. MORRIS CARTAGE CO.
JAMES F. MORRIS
Signature.

EXHIBIT "D-3"

August 26, 1941

OFFICE OF PRODUCTION MANAGEMENT
SOCIAL SECURITY BUILDING
WASHINGTON, D. C.

Mr. James Hoffa
Local Union 299
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
and Workers of America
1500 West Fort Street
Detroit, Michigan

Mr. R. B. Godfredson, Chairman
Local Cartage Negotiating Committee
751 - 15th Street
Detroit, Michigan

Gentlemen:

On August 13, 1941, this office made certain recommendations for compromise of settling the request of Local 299

pertaining to local cartage drivers in the Greater Detroit Area. After many conferences and meetings, the driver members of Local 299, at a meeting at Western High School held on August 13, 1941, accepted the recommendations of this office stated in my letter of August 13, except for proposal No. 3 on the second page of my letter. This paragraph in substance was a request by the operators for an increase of four hours per week to be added to their regular time as provided in existing agreements. This office, after listening to the objections of this request, gave the matter further serious consideration and we have arrived at the conclusion that the men have some justification for their objections, although we also feel that the operators should have some relief in this matter of hours.

Therefore, we are recommending that our proposal No. 3 as mentioned heretofore be amended allowing the hours of service to be increased to two hours instead of four to all existing contracts before any operator pays overtime as provided under existing wage agreements. All other provisions contained in our original memorandum having been accepted, we hope that all parties concerned will accept the two hour recommendation and that the entire matter will be amicably and immediately adjusted.

Very truly yours,

GEORGE PLAMBECK.

Accepted by the Union:

JAMES R. HOFFA
Signature.

Accepted by the Employer:

J. F. MORRIS CARTAGE CO.
JAMES F. MORRIS
Signature.

COURT'S CONCLUSIONS OF LAW

(Filed September 26, 1945)

At a Session of Said Court held in the Federal Building at Detroit, Michigan on September 26th, 1945.

PRESENT: Honorable Ernest A. O'Brien, United States District Judge.

This cause having been presented to the Court upon a stipulation of facts and counsel for the respective parties having been heard in oral argument, this Court makes the following conclusions of law:

1. Neither the Defendant nor employees are engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938.

2. To the extent that Defendant and his employees may be considered to be engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938, the maximum hour provisions of Section 7 of the Act are rendered inapplicable to such employees by the provisions of Section 13 of the Act in view of the fact that they are either employees employed in a bona fide executive or administrative capacity, i. e.: dispatchers and superintendent of maintenance, within the language of Section 13 (a)(1) or employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935, i.e.: truck drivers and garage employees, within the language of Section 13 (b)(1).

3. Complainant has failed to make out a case for injunctive relief against the Defendant and an Order may be entered dismissing the complaint.

ERNEST A. O'BRIEN,
United States District Judge.

JUDGMENT

(Filed September 26, 1945)

At a Session of Said Court held in the Federal Building at Detroit, Michigan on September 26th, 1945.

PRESENT: Honorable Ernest A. O'Brien, United States District Judge.

Plaintiff having filed his Complaint and the Defendant having appeared by counsel and having filed his Answer, and the cause having come on to be heard upon a written Stipulation of Facts and upon oral argument by counsel for the respective parties hereto and the Court having filed conclusions of law herein

NOW THEREFORE, upon motion of attorneys for Defendant, it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Complaint herein may be and is hereby dismissed without costs.

ERNEST A. O'BRIEN,
United States District Judge.

September 26th, 1945.

NOTICE OF APPEAL

(Filed December 6, 1945)

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above-entitled cause, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this cause on September 26, 1945, denying the injunctive relief prayed for in the plaintiff's bill of complaint.

Dated December 6, 1945.

(s) WILLIAM S. TYSON,
Acting Solicitor.

(s) JETER S. RAY,
Assistant Solicitor.

(s) CHARLES A. REYNARD,
Regional Attorney.

(s) FRANK R. DITTOE,
Attorney
Attorneys for Plaintiff.

Service of a copy of the foregoing notice is acknowledged on behalf of defendant this 6th day of December, 1945.

MATHESON, DIXON & BRADY,
By: (s) GEO. S. DIXON,
Attorney for Defendant.

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED ON APPEAL

(Filed December 6, 1945)

To the Clerk of said Court:

Please print the following portions of the record in the above-entitled cause for appeal to the United States Circuit Court of Appeals for the Sixth Circuit:

1. All Docket Entries.
2. Complaint.
3. Defendant's Answer.
4. Written Stipulation Of Facts and attached exhibits.
5. Supplement to Stipulation of Facts.
6. Court's Conclusions of Law.
7. Final Judgment of the Court.
8. Notice of Appeal.
9. Designation of Portions of Record to Be Printed On Appeal.
10. Stipulation Re Comparison of Record.
11. Clerk's Certificate.

Dated December 6, 1945.

(s) CHARLES A. REYNARD,
Regional Attorney.

(s) FRANK R. DITTOE,
Attorney,
Attorneys for Appellant.

Service of a copy of the foregoing designation is acknowledged on behalf of Appellee this 6th day of December, 1945.

MATHESON, DIXON & BRADY,
By: (s) GEORGE S. DIXON,
Attorneys for Appellee.

STIPULATION RE COMPARISON OF RECORD

(Filed December 6, 1945)

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

Dated: December 6, 1945.

(s) CHARLES A. REYNARD,
Regional Attorney.

(s) FRANK R. DITTOE,
Attorney.
Attorneys for Appellant.

MATHESON, DIXON & BRADY,
By: (s) GEORGE S. DIXON,
Attorneys for Appellee.

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

(Filed January 9, 1946)

Appellant having filed his notice of appeal and designation of record on appeal to the United States Circuit Court of Appeals for the Sixth Circuit herein on the sixth day of December 1945; and appellant having been unable to complete the preparation of the record on appeal herein and being unable to complete the same within the period of forty days from the date of filing of such notice of appeal; and appellant having moved the Court for an order extending the time within which the record on appeal may be filed and the appeal docketed in said Circuit Court of Appeals until March 1, 1946; and counsel for appellee having agreed to such extension;

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the said Circuit Court of Appeals be and the same hereby is extended to March 1, 1946.

Dated: January 9, 1946.

Ernest A. O'Brien,
United States District Judge.

Charles A. Reynard,
Regional Attorney,

Frank R. Dittoe,
Attorney,
Attorneys for Appellant

Matheson, Dixon & Brady,
By: George S. Dixon,
Attorneys for Appellee.

CLERK'S CERTIFICATE

EASTERN DISTRICT OF MICHIGAN,)
SOUTHERN DIVISION) ss:

I, George M. Read, Clerk of the United States District Court for said District, do hereby certify that the within and foregoing numbered pages contain a full and complete copy of all papers filed and all proceedings in said cause, in accordance with the stipulation of the attorneys for the respective parties as to the contents of the record on appeal and in accordance with the stipulation entered into between the attorneys for the respective parties in said cause, waiving comparison by the Clerk of the record on appeal.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of said Court at Detroit, this ..... day of ....., A. D. 1946.

GEORGE M. READ, *Clerk*,
United States District Court,
Eastern District of Michigan.

By .....
Deputy Clerk.

PROCEEDINGS IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(April 12, 1946—Before: HICKS, ALLEN and MILLER, JJ.)

This cause is argued by Helen Grundstein for Appellant and by George S. Dixon for Appellee and is submitted to the Court.

JUDGMENT

(Entered and Filed May 29, 1946)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings consistent with the views expressed in the opinion.

OPINION

(Filed May 29, 1946)

Before HICKS, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The Administrator of the Wage and Hour Division, United States Department of Labor, appeals from the judgment of the District Court, dismissing the complaint in an action brought by him under § 17 of the Fair Labor Standards Act to enjoin the appellee from violation of §§ 15(a)(1) and 15(a)(2) of the Act [§§ 217, 215(a)(1), 215(a)(2), Title 29 USCA].

The stipulated facts are briefly as follows: The appellee, a common carrier by motor vehicle, is the sole owner and operator of J. F. Morris Cartage Company in Ecorse, Michigan, doing business in and about Detroit, Michigan. He employs approximately 40 truck drivers, 14 mechanics, painters, washers, and repair men in the garage, 3 dispatchers and 3 general office workers. His operations are centralized at his main garage and yard in Ecorse, Michigan, which is used as a dispatch office, general maintenance and repair garage and storage space for equipment when not in active use. Although he is engaged in a general cartage business and is prepared to render such service to the general shipping public, approximately 97% of his business consists of the interplant transportation of unfinished steel in the course of its manufacture and the transportation of finished steel from the mills where it is produced to the plants of manufacturers in Detroit. This involves the transportation of steel from industrial establishments in Detroit to the mills of the Great Lakes Steel Corporation and the Michigan Steel Corporation at Ecorse, Michigan, and the transportation of steel from these mills to the plants of various Detroit automobile and parts manufacturers, as well as the hauling of unfinished steel between plants of the Great Lakes Steel Corporation or the Michigan Steel Corporation or the interplant hauling between the two mills. The steel transported is principally bumper stock, fender stock and other types of steel commonly used in the production of automobiles, trucks, trailers, ma-

chinery, and other goods, a substantial portion of which is sold and shipped in interstate commerce.

Approximately three percent of appellee's business consists of miscellaneous local cartage of a pickup and delivery character, which involves the handling of goods in transit to and from points outside the State of Michigan. Of appellee's total operations in 1941 (the calendar year preceding the filing of the complaint), 96.35 percent (19,062 trips of a total of 19,786 trips) represented interplant transportation. The remaining 3.65 percent were pickup trips, involving interstate transportation. In the average workweek throughout the entire year 1941, 75.6 percent of the drivers were exclusively engaged in interplant trips. The remaining 24.4 percent of the drivers in the average workweek during that year made one or more pickup or boatdock trips, or both. Two employees were exclusively engaged in interplant hauling during the full period of their employment during the year 1941. The "average employee" was exclusively engaged in interplant transportation during 75.6 percent of the workweek in 1941.

Each of the three of defendant's office employees is employed on a weekly salary basis and is compensated at a rate in excess of that required to be paid by § 6 of the Act. None of these three office employees has ever worked in excess of the maximum number of hours described in § 7 of the Act in any workweek.

The superintendent of maintenance, Herbert E. Smith, is paid a straight weekly wage of $60 regardless of number of hours worked. During substantially all of the workweeks since October 24, 1938, the effective date of the Act, he has been employed for a number of hours in excess of the number provided in § 7 of the Act without receiving compensation in excess of his regular weekly salary. In the normal course of his employment he has full authority over all mechanics and laborers with power to hire or discharge such employees and to make determinative representations concerning their employment. He works the same schedule of hours as the other em-

chanics and laborers, and devotes approximately 25% of his time in the performance of routine physical tasks of the same general character as that of the employees working under his direction and supervision.

The other employees of the appellee are employed on the basis of a fixed hourly rate of pay and are paid no additional compensation for hours worked in excess of 40 hours per week, except in the case of truck drivers, who, pursuant to the provisions of their collective bargaining agreement with appellee, receive time and one-half their regular rate of pay for all hours worked in excess of 54 in any workweek. This collective bargaining agreement is a standard Union contract covering all union drivers engaged in general cartage within the Detroit Metropolitan Area, whether employed in purely intrastate operations or in interstate operations.

The appellee denied that his employees were engaged in the production of goods for commerce within the meaning of § 3(j) of the Act; denied violation of the provisions of the Act; and claimed the exemptions provided by §§ 13(a)(1) and 13(b)(1) of the Act. [See §§ 203(j), 213(a)(1), and 213(b)(1), Title 29 USCA]. The District Court held that neither the appellee nor his employees were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act, and that, in any event, the dispatchers and superintendent of maintenance were employed in a bona fide executive or administrative capacity and were exempt under § 13(a)(1) of the Act, and that the truck drivers and garage employees were employees with respect to whom the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act of 1935 and were exempt under § 13(b)(1) of the Act. Other defenses raised by the answer were not ruled on by the District Court and are not urged by the appellee in this appeal.

The District Judge, in his ruling of September 26, 1945, did not have before him the decision of this Court

in *Griffin Cartage Company* v. *Walling, Administrator*, rendered on February 12, 1946, affirming the judgment of the District Court and approving the District Court's opinion as reported in 62 Fed. Supp. 396. That decision is decisive upon the first issue involved herein, namely, whether or not the employees of the defendant are engaged in the "production of goods for commerce" within the meaning of § 3(j) of the Fair Labor Standards Act. Upon facts essentially similar to those present in this case it was held that the employees were so engaged. The question is sufficiently discussed in the District Court's opinion to make it unnecessary to repeat it here. See also *Armour & Company* v. *Wantock*, 323 U. S. 126; *The Roland Electrical Company* v. *Walling, Administrator*, ... U. S. ....., decided January 28, 1946; *West Kentucky Coal Company* v. *Walling, Administrator*, ... Fed. (2d) ....., ... (C. C. A. 6th), decided February 12, 1946; *Mid-Continent Pipe Line Company* v. *Hargrave*, 129 Fed. (2d) 655 (C. C. A. 10th); *Rockton & Rion R. R. Company* v. *Walling, Administrator*, 146 Fed. (2d) 111 (C. C. A. 4th); *Walling, Administrator* v. *Comet Carriers*, 151 Fed. (2d) 107 (C. C. A. 2nd).

§ 13(b)(1) of the Fair Labor Standards Act provides that the provisions of § 7 of the Act dealing with maximum hours and overtime compensation shall not apply to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act, 1935." § 204 of the Motor Carrier Act (§ 304, Title 49, USCA) was construed by the Supreme Court in *United States* v. *American Truck Associations*, 310 U. S. 534, as being "limited to those employees whose activities affect the safety of operation." In *Southland Gasoline Company* v. *Bayley*, 319 U. S. 44, the Supreme Court construed § 13(b)(1) of the Fair Labor Standards Act and held that the word "power" therein meant the existence of the power and not its actual exercise, and that such employees as were subject to regulation under § 204

of the Motor Carrier Act of 1935 were exempt from the provisions of the Fair Labor Standards Act, even though the Interstate Commerce Commission had not actually exercised such power. The jurisdiction of the Commission and the corresponding exemption under the Act extends to truck drivers and to such mechanics who actually perform inspection and repair work on the truck but not to other employees such as painters, washers, and dispatchers. *United States* v. *American Trucking Associations*, supra; *Keeling* v. *Huber and Huber Motor Express*, 57 Fed. Supp. 617, and cases therein referred to.

Where an employee of a motor carrier devotes part of his time to work in interstate commerce affecting the safety of operation and devotes the remainder of his time to work which is not exempt from the provisions of the Fair Labor Standards Act, the question arises whether he has devoted a sufficient part of his time to the work which is exempt to bring him within the exemption provision of the Act. The Administrator of the Wage and Hour Division takes the position that the exemption is applicable to a truck driver only if he spends the greater part of his time during any workweek on exempt activities. On the other hand, some Courts have adopted the rule that the exemption is applicable to any truck driver who devotes a substantial part of his time in any workweek to the driving of trucks in interstate commerce, while other Courts have held that the exemption is applicable to any truck driver who performs any duties during the workweek which substantially affect the safety of operation, although the amount of such duties is comparatively small. Three cases involving these different views are now pending before the Supreme Court. *See Walling* v. *Comet Carriers*, 151 Fed. (2d) 107 (C. C. A. 2nd); *Levinson* v. *Spector Motor Service*, 389 Ill. 466; *Ispass* v. *Puramid Motor Freight Corp.*, 152 Fed. (2d) 619 (C. C. A. 2nd). This Court also has had the same question before it and has adopted the rule that a truck driver engaged in driving trucks both in interstate commerce and in intrastate commerce must

devote a substantial part of his time to the driving of trucks in interstate commerce in order to come within the exemption provision. *Fletcher* v. *Grinnell Bros.*, 150 Fed. (2d) 337,-340 (C. C. A. 6th); *West Kentucky Coal Company* v. *Walling*, supra (C. C. A. 6th). At the present time the question is accordingly not an open one in this Circuit. However, the rule still leaves open the question of what constitutes a substantial part of the time of the employee in question. It appears unnecessary to attempt to answer that question definitely in this case, as the stipulated facts fail to show more than a very small proportion of time devoted to interstate transportation. The burden is on the employer to bring himself within the exemption. *Fletcher* v. *Grinnell Bros.*, supra. The appellee has failed to meet that burden in this case. *West Kentucky Coal Company* v. *Walling*, supra.

§ 13(a)(1) of the Act exempts from the wage and hour provisions "any employee employed in a bona fide executive (or) administrative . . . capacity . . . (as such terms are defined and delimited by regulations of the Administrator)." Pursuant to this authority the Administrator has issued regulations defining and delimiting such terms. Both the regulation defining "Executive" (§ 541-1) and the one defining "Administrative" (§ 541-2) require the existence of certain facts—in the conjunctive rather than the disjunctive. This includes for the "executive" that he be "compensated for his services on a salary basis at not less than $30.00 per week," and that his "hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction." It includes for one employed in an "administrative capacity" that he be "compensated for his services on a salary or fee basis at a rate of not less than $200 per month," and that his work be non-manual in nature and require the exercise of discretion or independent judgment. The validity and binding effect of these regulations are well established.

Sun Publishing Company v. *Walling*, 140 Fed. (2d) 445 (C. C. A. 6th, cert. denied, 322 U. S. 728; *Walling* v. *Yeakley*, 140 Fed. (2d) 830 (C. C. A. 10th); *Fanelli* v. *United States Gypsum Company*, 141 Fed. (2d) 216 (C. C. A. 2nd). It is also well settled that in order to bring an employee within the classification the employer must show that all of the enumerated qualifications exist. *Schmidt* v. *Emigrant Industrial Sav. Bank*, 148 Fed. (2d) 294 (C. C. A. 2nd); *Smith* v. *Porter*, 143 Fed. (2d) 292 (C. C. A. 8th); *Lawley and Son Corp.* v. *South*, 140 Fed. (2d) 439 (C. C. A. 1st). The stipulated facts show that the dispatchers are not employed on a salary basis, one of the essential requirements for both the executive and one employed in an administrative capacity. See *Benedict* v. *United States*, 176 U. S. 357. They also show that the superintendent of maintenance works the same schedule of hours as the other mechanics and devotes approximately 25 percent of his time to work of the same general character as that of employees working under his direction and supervision. Accordingly, he does not qualify as an executive. The physical and manual character of much of his work prevents his classification as one employed in an administrative capacity. See *Walling, Administrator* v. *The General Industries Co.*, ... Fed. (2d) ....., decided by this Court on May 28th, 1946.

The judgment of the District Court is reversed and the case remanded for further proceedings consistent with the views expressed herein.

CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *L. Metcalfe Walling, Admr.* v. *James F. Morris*, No. 10,194, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 7th day of August, A. D. 1946.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 7, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the second question presented by the petition for the writ and the case is transferred to the summary docket. The Interstate Commerce Commission is invited to file a brief *amicus curiae* if so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS,

Petitioner,

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE S. DIXON,
MACDONALD, DIXON & BEAN,

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Statement of the matter involved	1
Jurisdictional statement	2
Question presented	2
Reasons relied upon for allowance of the writ	3
Prayer for writ	4
Brief in support of petition	7
Nature of controversy	7
Decree sought to be reviewed	8
Reference to official reports	8
Statement of jurisdiction	8
Summary of evidence	8
Specification of assigned errors	11
Argument	12
1. Petitioner is engaged exclusively in transportation	12
2. Transportation, conducted as a separate enterprise does not constitute production	13
3. Congress did not intend to regulate intrastate transportation as production of goods	13
4. Intrastate transportation constitutes a local enterprise subject to State regulation	14
5. Sec. 13(b)(1) excludes a majority of petitioner's employees from the maximum hours provisions of Section 7	15
6. Two Federal agencies and the Circuit Court of Appeals disagree on the proper interpretation of Section 13(b)(1)	15
7. Scope of Sec. 13(b)(1) exemption should not depend upon degree of employee activity	16
8. The decision below defeats the purpose of the Section 13(b)(1) exception	18
9. Conclusion of argument	19

Table of Authorities

Cases:

	Page
Boutell d/b/a F. J. Boutell Service Company v. *Walling*, 66 Sup. Ct. 631, 326 U. S. Case No. 73, October, 1945	18
Ex Parte No. MC. 2, 3 MCC 665, 28 MCC 125	14
Ex Parte No. MC 3, 23 MCC 1	16
Fletcher v. *Grinnell Bros.*, 150 F. (2d) 337	4, 16
Ispass v. *Pyramid Motor Freight Corp.*, 152 F. (2d) 337, pending on certiorari granted March 25, 1945, No. 821, 1945-46 docket	4, 16
Levinson v. *Spector Motor Service*, 389 Ill. 466, pending on certiorari granted October 8, 1945, Case No. 139, 1945-46 docket	4, 16
Overnight Motor Transportation Co., Inc., v. *Missel*, 316 U. S. 572	19
Santa Cruz Fruit Packing Co. v. *N. L. R. B.*, 403 U. S. 453	13
Southland Gasoline Co. v. *Bayley*, 319 U. S. 44	18
U. S. et al. v. *American Trucking Associations, Inc.*, 310 U. S. 534	14, 15
Walling v. *Comet Carriers, Inc.*, 151 F. (2d) 107	4, 16
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	14
Walling v. *Morris*, 155 F. (2d) 832	4, 16
West Kentucky Coal Co. v. *Walling*, 153 F. (2d) 582	4, 16
Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490	13
10 E. 40th St. Building, Inc., v. *Callus*, 325 U. S. 578	14, 15

Other Authorities

Fair Labor Standards Act of 1938, 29 U. S. C. Sec. 201 et seq.	1, 2, 7
Congressional Record, Vol. 81: Page 7875 (1937)	18
Wage and Hours Administration Interpretive Bulletin No. 9, CCH Labor Law Service (3d Ed.), Vol. 2, paragraph 32,109	16
Federal Motor Carrier Act, 49 U. S. C. A. 203 (b)	14
Michigan Public Acts, Act 314, 1937	14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, James F. Morris, a resident of Grosse Isle, Michigan, prays this Honorable Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its final judgment, entered on the 29th day of May, 1946, reversing a judgment of the District Court of the United States for the Eastern District of Michigan.

Statement of the Matter Involved

This case involves a determination of the applicability of the provisions of the Fair Labor Standards Act of 1938

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(29 U. S. C. sec. 201, *et seq.*) to general cartage operations conducted by a common carrier for hire, such operations being conducted through motor vehicle movements which are physically intrastate but which involve the movement of both intrastate and interstate traffic. In particular, the case involves a determination of whether an employer so engaged may properly be enjoined from claimed violation of the Act upon complaint of the Administrator of the Wage and Hour Division, United States Department of Labor.

Such complaint was filed against Petitioner by the Administrator of the Wage and Hour Division, United States Department of Labor, in the United States District Court for the Eastern District of Michigan on March 26, 1942, seeking injunctive relief. The case was presented to the District Court upon an agreed stipulation of facts followed by oral argument. The District Court judgment dismissing the Administrator's Complaint on September 26, 1945, was reversed by judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered May 29, 1946.

Jurisdictional Statement

Jurisdiction to review a final judgment of the United States Circuit Court of Appeals is conferred upon this Court by statute (U. S. Code, Title 28, Section 347). This Petition for Writ of Certiorari seeks review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit.

Questions Presented

The questions presented for determination are as follows:

1. Are employees of a common carrier for hire who conducts a general cartage business engaged in the "production of goods for commerce" where the performance of their

usual and normal duties in the cartage operation involves the transportation of property which, after further processing and fabrication, becomes a part or ingredient of other products which are shipped in commerce in their finished form?

2. Where such employees during a minority of their time are engaged in the transportation of interstate traffic are they exempt under the provisions of Section 13(b)(1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U. S. C. sec. 301, *et seq.*)?

Reasons Relied upon for Allowance of Writ

Petitioner advances the following reasons as grounds upon which this Honorable Court should, in its discretion, grant a Writ of Certiorari as herein prayed:

1. Applicability of the provisions of the Fair Labor Standards Act to the motor vehicle operations of common carriers for hire who engage solely in transportation as an independent enterprise is a matter of substantial and national importance. The decision of this question by the United States Circuit Court of Appeals for the Sixth Circuit appears to rest upon Court decisions in which the common carrier status of the employer either is not involved or is not considered. In the absence of review by this Court, the question remains undecided as to whether regulation under the Fair Labor Standards Act is to be extended to transportation enterprises on the basis of court decisions relating to pure productive enterprises.

2. The applicability of the exemption set forth in Section 13(b)(1) of the Act requires an interpretation of the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935. The Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor, differ in their interpretation of Section 13(b)(1) of the Fair Labor Standards Act and of Section 204 of the Motor Carrier Act. The Circuit Court of Appeals for the Second Circuit (*Walling* v. *Comet Carriers*, 151 Fed. (2nd) 107; *Ispass* v. *Pyramid Motor Freight Corp.*, 152 Fed. (2nd) 619) and the Circuit Court of Appeals for the Sixth Circuit (*Fletcher* v. *Grinnell Brothers*, 150 Fed. (2nd) 337; *West Kentucky Coal Company* v. *Walling*, 153 Fed. (2nd) 582; *Walling* v. *Morris*, 155 Fed. (2nd) 832) have both taken an interpretive position at variance with that of both the Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor. The Illinois Supreme Court has taken an interpretive position which is believed to vary to some degree from that taken by the above Circuit Courts of Appeal (*Levinson* v. *Spector Motor Service*, 389 Ill. 466). In three of the cases above cited, certiorari with respect to this issue was granted by this Court, and two of the cases in which certiorari was granted on this issue are presently pending before this Court, the third having been dismissed upon motion of the Petitioner. This would indicate that this issue involves an important question of Federal law which has not been, but should be, settled by this Court.

Prayer for Issuance of Writ of Certiorari

WHEREFORE, Petitioner respectfully prays this Court for the issuance of a Writ of Certiorari to the United States

Circuit Court of Appeals for the Sixth Circuit to review its final judgment in the above cause, entered May 29, 1946.

JAMES F. MORRIS,
Petitioner;
By GEORGE S. DIXON.
MATHESON, DIXON & BRADY,
Attorneys for Petitioner,
2280 Penobscot Bldg.,
Detroit, 26, Michigan.

Dated: Detroit, Michigan, August 20, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Nature of Controversy

This case arises under the Fair Labor Standards Act of 1938 (29 U. S. C. sec. 201 *et seq.*) upon complaint filed by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Act, to restrain James F. Morris, hereinafter referred to as Petitioner, from violation of Sections 15(a)(1) and 15(a)(2) of the Act. The complaint was filed in the United States District Court for the Eastern District of Michigan. The case was submitted to the District Court on an agreed

stipulation of facts followed by oral argument. The District Court entered judgment dismissing the Administrator's Bill of Complaint.

Decree Sought to Be Reviewed

Review is here sought of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered May 29, 1946, reversing the judgment of the District Court for the Eastern District of Michigan which dismissed the Administrator's Bill of Complaint.

Reference to Official Reports

The conclusions of law by the United States District Court for the Eastern District of Michigan are not officially reported.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 155 Fed. (2nd) 832.

Statement of Jurisdiction

Review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit by Writ of Certiorari is sought of this Court within the discretionary powers conferred upon this Court by statute (U. S. Code, Title 28, Section 347).

Summary of Evidence

This case was presented to the United States District Court for the Eastern District of Michigan upon a stipulation of facts (R. 11-27) and supplement to stipulation of facts (R. 28-38). The stipulation of facts and the supplement to stipulation of facts are relatively concise and may warrant examination in their entirety. For purposes of this Brief, however, this summary of the evidence is confined to those facts believed to be material to a decision

of the questions specifically raised for review in the Petition for Certiorari.

Petitioner, James F. Morris, is the sole owner and operator of the J. F. Morris Cartage Company, which is operated as a sole proprietorship. Under such name, Petitioner is engaged as a common carrier for hire in the local transportation of property by motor vehicle in and about the metropolitan area of Detroit, Michigan, all of such operations being physically intrastate (R. 11).

In the regular course of his business during the calendar year 1941, Petitioner employed approximately sixty persons of whom approximately forty were truck drivers and fourteen were garage employees (R. 11).

Although Defendant is engaged in the general cartage business and is prepared to render such service to the general shipping public, approximately ninety-seven per cent (97%) of the total revenue derived by Petitioner from such cartage services is received for services performed for two steel corporations located in Ecorse, Michigan (R. 12).

Of Petitioner's operations during the year 1941, approximately sixty per cent (60%) consisted of the transportation of steel from steel mills in Ecorse to manufacturing and industrial establishments in Detroit. Approximately thirty-five per cent (35%) consisted of the transportation of steel within the steel mills or between the steel mills located in Ecorse and the steel is so transported for purpose of further processing in the course of its manufacture prior to sale and shipment. An unsegregated portion of the steel so produced is shipped in commerce. In performing these operations Petitioner's trucks often operate within the plant and without leaving the plant for several days (R. 12).

Of the remaining operations of Petitioner approximately three per cent (3%) consists of the transportation of freight

to or from boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit area involving the pick up or delivery of freight moving in continuous transportation in interstate commerce. Defendant's compensation for such latter transportation is in some instances paid by connecting interstate carrier and in other instances by the shipper. Approximately one per cent (1%) consists of the transportation of freight from industrial establishments in Detroit to the steel mills in Ecorse and approximately one per cent (1%) consists of the transportation of miscellaneous freight in general cartage service for hire for miscellaneous shippers (R. 13).

The steel transported by Petitioner during the year 1941 from the steel mills in Ecorse to the manufacturing or industrial establishments in Detroit consisted principally of types of steel commonly used in the manufacture of automobiles and parts and since the effective date of the Fair Labor Standards Act such consignee firms have been engaged in the production and shipment in interstate commerce of finished products incorporating the types of steel transported by Petitioner (R. 14).

An examination and analysis of the driving activity of Petitioner's drivers during the year 1941 revealed that out of 19,786 trips examined, 19,062 or 96.35% represented interplant movements, the balance being pickup or delivery trips involving the transportation of interstate freight (R. 15).

Further analysis reveals that in an average workweek in 1941, 75.6% of the drivers were exclusively engaged in interplant trips and the remaining 24.4% of the drivers made one or more pickup or delivery trips involving interstate traffic. The "average employee" was exclusively engaged in interplant transportation during 75.6% of the workweeks. Two employees were exclusively engaged in

interplant hauling during the full year and with the exception of two other employees, all of Petitioner's drivers were exclusively engaged in interplant hauling during the greater part (fifty per cent (50%) or more) of the workweeks in the year 1941 (R. 16).

Petitioner's garage employees and drivers have been employed on an hourly rate basis and have been employed for a number of hours in excess of the maximum hours provided by Section 7 of the Act but have not received compensation in excess of the regular hourly rate for such overtime employment with the exception noted below (R. 18).

Since August 1, 1940, Petitioner's drivers have been employed pursuant to the terms of a collective bargaining agreement under which overtime compensation is paid for hours worked in excess of the workweek established by that contract, formerly fifty-two hours and latterly fifty-four hours (R. 18).

The collective bargaining agreements referred to above were union contracts which were in full force in the Detroit metropolitan area and covered all union drivers engaged in general cartage operations within the Detroit metropolitan area, whether employed by companies engaged exclusively in a general cartage business or employed by companies engaged in interstate operation, but employed to perform services competitive with those performed by Petitioner's employees (R. 19-28, 29).

Specification of Assigned Errors

Petitioner alleges that the United States Circuit Court of Appeals for the Sixth Circuit committed error in its entry of judgment on May 29, 1946, in the following particulars:

1. In concluding as a matter of law that Petitioner's employees were engaged in the "production of goods for com-

merce" within the meaning of Section 3(j) of the Fair Labor Standards Act while engaged in the performance of transportation or in the performance of duties necessary to such transportation in connection with general cartage operations conducted by a common carrier for hire.

2. In concluding as a matter of law that an employee of a motor carrier must devote a substantial part of his time to the performance of duties affecting the safety of operation of motor vehicles in interstate commerce before such employee falls within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

3. In finding as a matter of fact that no employee of Petitioner did spend a substantial portion of his time in the performance of duties affecting the safety of operation so as to bring such employee within the provisions of the exemption set forth in Section 13(b)(1) of the Fair Labor Standards Act.

Argument

1. *Petitioner Is Engaged Exclusively in Transportation*

Petitioner, an individual, conducts a local cartage business, in the Detroit Metropolitan Area, as a common carrier by motor vehicle. His transportation operations are physically intrastate but involve the handling of both interstate traffic and intrastate traffic. His employees are engaged exclusively in transportation or in activities related to transportation.

The Administrator of the Wage and Hour Division, United States Department of Labor, seeks to enjoin Petitioner from violations of the Fair Labor Standards Act under a theory that Petitioner's employees are engaged in the "production of goods for commerce" and are beyond the scope of any exemption contained in the Act. Petitioner

contends that his employees are not engaged in the "production of goods for commerce"; that the majority of them are employees subject to regulation by the Interstate Commerce Commission under the Motor Carrier Act of 1935, and therefore excluded from regulation as to maximum hours under Section 13(b)(1) of the Fair Labor Standards Act of 1938; and that he himself is engaged as a common carrier in the transportation in the regular course of his business of goods which he does not produce, thereby taking to himself the benefit of the exemption set forth in Section 15(a)(1) of the Fair Labor Standards Act.

2. *Transportation, Conducted as a Separate Enterprise, Does Not Constitute Production*

Transportation conducted by a common carrier for hire does not constitute "production of goods for commerce" in fact, nor within the intent of Congress. Congress did not intend to obliterate all distinction between production and transportation. *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 504. Transportation traditionally has been considered a commercial enterprise and not a productive enterprise. It cannot be transmuted into a productive enterprise by mere definition. The Federal regulatory power over commerce finds its birth in the Constitution and not in Congressional definition.

3. *Congress Did Not Intend to Regulate Intrastate Transportation as Production of Goods*

The power of Congress to regulate commerce extends only to interstate commerce. *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 403 U. S. 453, 466. Congress has made no attempt to regulate the transportation of intrastate freight by a motor carrier under either the Motor Carrier Act, Title 49 U. S. C. A. Sec. 303(a) (10), or within its

definition of "commerce" in the Fair Labor Standards Act, Title 29, U. S. C. A., Sec. 203(b). It could not have intended to extend Federal regulation to the intrastate transportation of freight by a motor carrier through the mere device of including "transportation" within its definition of the word "produce" in Section 3(j) of the Act, Title 29, U. S. A., Sec. 203(j), because in enacting the Fair Labor Standards Act, Congress did not see fit to exhaust its congressional jurisdiction over commerce, *10 E. 40th St. Bldg., Inc.* v. *Callus*, 325 U. S. 578, 579, to the extent that it did in enacting the Interstate Commerce Act, an Act expressly directed to the regulation of transportation.

4. *Intrastate Transportation Constitutes a Local Enterprise Subject to State Regulation*

The transportation of intrastate freight has long been considered subject to the regulatory power of the State governments. By the time the Interstate Commerce Commission had instituted its investigations of the necessity of establishing maximum hours of employment for employees engaged in transportation of interstate freight, forty-three States, including Michigan, and the District of Columbia had enacted laws prescribing a maximum limit on hours of service for drivers of for-hire vehicles. Ex Parte MC 2, 3 MCC 665, 683; *U. S. et al.* v. *American Trucking Associations Inc.*, 310 U. S. 534, 545; Michigan Public Acts, Act 314, 1937.

Congress left local enterprise to regulation by the States. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570. The Courts should not absorb by adjudication essentially local activities. *10 E. 40th St. Bldg., Inc.* v. *Callus*, 325 U. S. 578, 582. It is difficult to conceive of an enterprise more "local" than local cartage operations of a motor common carrier within the geographical confines of a single metro-

politan area. A common carrier is required by law to accept all freight tendered by the shipping public and thus is required to serve an unrestricted variety of patrons, one of the facts considered of significance in this Court's determination of what "spontaneously satisfies the common understanding of what constitutes a local business." *10 E. 40th St. Bldg., Inc.* v. *Callus, supra*, 583. Coverage under the Fair Labor Standards Act should not be dependent upon the pure contingency of the type of freight tendered to a common carrier for hire. Under such a theory, coverage and non-coverage could fluctuate from day to day and from week to week in response to the transportation requirements of the shipping public.

5. *Sec. 13(b) (1) Excludes a Majority of Petitioner's Employees from the Maximum Hours Provisions of Sec. 7*

Section 13(b)(1) of the Fair Labor Standards Act excludes from the maximum hours provisions of Section 7 employees with respect to whom the Interstate Commerce Commission has jurisdiction to establish qualifications and maximum hours of service under the provisions of Section 204 of the Motor Carrier Act, 1935. The jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act extends to employees whose duties affect safety of operation. *United States et al.* v. *American Trucking Associations Inc.*, 310 U. S. 534. This includes motor vehicle operators, and the Interstate Commerce Commission has in fact regulated maximum hours of drivers. Ex parte MC 2, 3 M. C. C. 665. Most of the employees with whom we are here concerned are truck drivers (R. 11).

6. *Two Federal Agencies and the Circuit Court of Appeals Disagree on the Proper Interpertation of Sec. 13(b)(1)*

The Interstate Commerce Commission interprets its jurisdiction to regulate maximum hours of service as broad

enough to cover truck drivers engaged in transporting interstate freight on a single trip during the workweek. Ex Parte No. MC3, 23 MCC1, 39. The Administrator of the Wage and Hour Division interprets the Section 13(b)(1) exemption more narrowly, holding that any truck driver who spends the greater part of his time during any workweek in the performance of non-exempt activities is not within the scope of the exemption. Interpretive Bulletin No. 9, CCH Labor Law Service, paragraph 32,109.

The Second Circuit Court of Appeals has rejected both interpretations, holding that the Administrator's interpretation is too narrow in view of the absence of any language in the Motor Carrier Act limiting the jurisdiction of the Interstate Commerce Commission, but maintaining that the duties performed by the employee must *substantially* affect safety of operations in the movement of interstate freight before the exemption becomes operative. *Walling* v. *Comet Carriers, Inc.*, 151 Fed. (2nd) 107, 111; *Ispass* v. *Pyramid Motor Freight Corp.*, 152 Fed. (2nd) 619. The Sixth Circuit Court of Appeals has applied the same "substantiality" test in determining applicability of the exemption *Fletcher* v. *Grinnell Bros.*, 150 Fed. (2nd) 337, 340; *West Kentucky Coal Co.* v. *Walling*, 153 Fed. (2nd) 582, 586; *Walling* v. *Morris*, 155 Fed. (2nd) 832, 836. The issue is now pending before this Court. *Levinson* v. *Spector Motor Service*, 389 Ill. 466, Case No. 139; *Pyramid Motor Freight Corp.* v. *Ispass*, *supra*, Case No. 821.

7. Scope of Sec. 13 (b) (1) Exemption Should Not Depend Upon Degree of Employee Activity

The adoption and application of the "substantiality" test by the courts is said by them to be supported by the conclusions of the Interstate Commerce Commission in Ex Parte MC 2, 28 M. C. C. 125, 131, to the affect that its

jurisdiction extends only to employees who devote a substantial part of their time to activities which directly affect safety of operations. However, if the Commission's report in 28 M. C. C. 125 is read in its entirety it is obvious that the Commission was applying the test of substantiality to *classes* of employees rather than to the *individual* activities of an *individual* employee. This is evidenced by the Commission's conclusions (Page 133 of the report) that mechanics, *as a class*, devote a large portion of their time to activities which directly affect the safety of operations of motor vehicles, within the jurisdiction of the Commission. Same conclusion with respect to loaders, *as a class*, page 134. Same conclusion with respect to helpers, *as a class*, page 136. Contrary conclusion with respect to garage employees other than mechanics, *as a class*, page 133, and with respect to dispatchers, *as a class*, page 135. In any event, the jurisdiction of the Interstate Commerce Commission is established by statute and not by Commission interpretation and Sec. 204 of the Motor Carrier Act contains no restriction upon the Commission's jurisdiction based upon degree of activity.

The adoption and application of the substantiality test to the individual activities of the individual employee would burden the Commission with problems of enforcement and plague the courts with factual controversy. Further, to the extent that the individual activities of the individual employee may be found to be so unsubstantial as to remove the employee from the jurisdiction of the Commission, the power of the Commission to regulate transportation in the interests of safety will be impaired. The courts should hesitate to impair the jurisdiction of the Interstate Commerce Commission even though they may think that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act. Dissenting

Opinion, *Boutell, d/b/a F. J. Boutell Service Company* v. *Walling*. 66 S. Ct. 631, 637, 326 U. S. Case No. 73 October 1945.

8. *The Decision Below Defeats the Purpose of the Section 13 (b)(1) Exemption*

The claimed purpose of the Section 13(b)(1) exemption was to avoid regulation of hours of service by two governmental agencies by entrusting the duty to the Interstate Commerce Commission. 81 Congressional Record 7875 (1937). "By exempting the drivers of motors from the maximum hours limitation of the Fair Labor Standards Act, Congress evidently relied upon the motor carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime." *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 48.

Nothing in this record nor in the whole history of trucking operations will indicate that intrastate transportation of property by motor vehicle is any less a business requiring fluctuating hours of employment, without the burden of additional pay for overtime, than interstate transportation of property by motor vehicle. The extension of coverage of the Fair Labor Standards Act to intrastate transportation under the theory that it constitutes production of goods and the removal of interstate transportation from coverage under the theory that it constitutes commerce rather than production of goods, reflects a differentiation and discrimination between the two types of transportation based upon an unreasonable and arbitrary classification. One of the Congressional purposes in enacting the Fair Labor Standards Act was the provision of overtime pay to lessen the irritations created by the existence of long hours in com-

petitive industries which might impede the free interstate flow of commodities by creating friction between production areas with different length workweeks and by offering opportunities for unfair competition which would induce labor discontent. *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316, U. S. 572, 576.

It is disclosed by this record (R. 19, 28, 29) that motor carriers performing interstate transportation and regulated on a sixty-hour maximum week basis by the Interstate Commerce Commission operate in competition with Petitioner as to whose operations maximum hour regulation on the basis of a forty-hour week is here sought to be extended, both classes of carriers being parties to an identical union contract establishing a uniform wage scale and uniform workweek. If Petitioner is required to pay overtime compensation for hours of employment in excess of forty during a given workweek, while his competitors, due to exclusion as interstate operators, are permitted to operate on a sixty-hour week basis, without overtime compensation, Petitioner is placed at a competitive disadvantage with such competitors and such competitor's employees are placed at an economic disadvantage in comparison with Petitioner's employees. This will tend to create the very basis for labor discontent and unfair competition which Congress allegedly sought to alleviate or to eliminate in its enactment of the Fair Labor Standards Act. *Overnight Motor Transportation Co., Inc.* v. *Missel, supra.*

9. *Conclusion of Argument*

The United States Circuit Court of Appeals for the Sixth Circuit was in error in concluding that the activities of employees of a motor common carrier conducting local cartage operations in a single metropolitan area were engaged in the "production of goods for commerce" and that they were

not excluded from the maximum hours provisions of the Act under the provisions of Section 13 (b) (1) in view of the degree of their activities in interstate commerce as disclosed on this record. The final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, 155 Fed. (2nd) 832 should be reviewed by Writ of Certiorari.

Respectfully Submitted,

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Dated: Detroit, Michigan, August 20, 1946.

(6268)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, Petitioner,

vs.

WILLIAM R. McCOMB,
Administrator of the Wage and Hour Division,
United States Department of Labor

On Writ of Certiorari to the United States Circuit Court
of Appeals for the Sixth Circuit

BRIEF ON BEHALF OF PETITIONER

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INDEX

	Page
Reference to Official Reports	1
Statement of Jurisdiction	2
Statement of the Case	4
Assignment of Errors	9
Summary of Argument	10
Argument	23
I. Certain of Petitioner's Employees Transport Interstate Freight	23
II. Such Interstate Transportation is Subject to Regulation Under the Motor Carrier Act	28
III. Such Employees are Subject to the Safety Regulatory Power of the Interstate Commerce Commission	31
IV. The Safety Regulatory Power of the Commission is not Affected by the Volume, Degree, or Frequency of Such Interstate Transportation	42
V. Such Employees are Exempt from the Overtime Compensation Provisions of the Fair Labor Standards Act	49

CITATIONS

Cases:

American Trucking Associations, Inc. v. United States, 31 F. Supp. 35	21, 55
Boutell, et al. v. Walling, 66 S. Ct. 631	17, 45
Ex Parte No. MC 2, 3 MCC 665	13, 34
Ex Parte No. MC2, 28 MCC 125	14, 37
Ex Parte No. MC 3, 23 MCC 1	10, 14, 15, 26, 35, 47, 49

Page

Ex Parte No. MC 3, 26 MCC 205 ..... 14, 34
Ex Parte No. MC 4, 1 MCC 1 ..... 13, 33
Ex Parte No. MC 4, 10 MCC 533 ..... 14, 34
Ex Parte No. MC 4, 14 MCC 669 ..... 14, 34
Levinson v. Spector Motor Service, 91 L. Ed. 846 3, 13, 15, 16, 19, 32, 34
Martin v. United States, 100 F. (2nd) 490 ..... 11, 31
Overnight Motor Transportation v. Missel, 316 U. S. 572 ..... 22, 58
Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869 3
Richardson v. James Gibbons Co., 132 F. (2nd) 627 18, 46
Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44 ..... 18, 46, 52
United States v. American Trucking Ass'n., Inc., 310 U. S. 534 ..... 12, 31, 32, 55
Walling v. Comet Carriers, 151 F. (2nd) 107 ..... 17, 46
Walling v. Morris, 155 F. (2nd) 832 ..... 2, 37

Statutes:

Motor Carrier Act (Interstate Commerce Act, Part II); Act of 1935, C. 498, 49 Stat. 543, 49 U. S. C. A. Sec. 304 ..... 2, 63
Section 202(a) 11, 21, 28, 56, 63
Section 202(c) 10, 11, 25, 29, 63
Section 203(b)(8) 10, 11, 25, 64
Section 203(b)(9) 11, 30, 65
Section 204(a)(1) 2, 4, 12, 31, 65
Section 206(a) 10, 25, 66

The Fair Labor Standards Act; Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201:
Section 2 61
Section 7 ..... 4, 8, 61

	Page
Section 13(b)(1)	2, 61
Section 15(a)(1)	3, 62
Section 15(a)(2)	3, 62
Section 16	3
Section 17	3
Interstate Commerce Act; U. S. Code, Title 49, Chapter 1, Sec. 102	21, 56
U. S. Code, Title 28, Sec. 347	4

Miscellaneous:

Interpretive Bulletin No. 9, issued by the Wage and Hour Division, United States Department of Labor	15, 40, 45, 46
Interstate Commerce Commission Administrative Ruling No. 79	10, 16, 26, 40
C. H. H. Federal Carriers Service, Par. 6079	16, 26, 40
Interstate Commerce Commission Motor Carrier Safety Regulations—47 C. F. R. Cum. Supp., Parts 190, 191	15, 40

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United States Department of Labor

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF ON BEHALF OF PETITIONER

REFERENCE TO OFFICIAL REPORTS

The United States District Court, Eastern District of Michigan, conclusions of law (R. 39) upon which an order was entered dismissing the bill of complaint of the Admin-

istrator of the Wage and Hour Division, United States Department of Labor, are not officially reported.

The United States Circuit Court of Appeals, Sixth Circuit, opinion (R. 48-54), reversing the District Court judgment and remanding the case for further proceedings consistent with the views expressed therein, is reported in *155 F. (2nd) 832.*

STATEMENT OF JURISDICTION

This Court's allowance of review by Certiorari limits review to the question of the availability to Petitioner, with respect to certain of his employees, of the exemption set forth in Section 13 (b)(1)[1] of the Fair Labor Standards Act, on the basis of their being employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204[2] of the Motor Carrier Act, 1935. (Interstate Commerce Act, Part II).

The availability to Petitioner of the Section 13(b)(1) defense was passed upon affirmatively by the District Court for the Eastern District of Michigan (R. 39), but the defense was held unavailable to Petitioner by the United States Circuit Court of Appeals for the Sixth Circuit (R. 48-54) on the ground that employees do not come within the exemption provision unless they devote a *substantial part of their time* to the performance of duties affecting safety of operation and on the further ground

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[1] Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 213. Appendix, p. 61.

[2] Act of 1935, c. 498, 49 Stat. 543, 49 U. S. C. A., Sec. 304. Appendix, p. 65.

that Petitioner had not met the burden of proving that any of his employees did spend a *substantial part of their time* in the performance of duties affecting safety of operation.

The opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit was of necessity predicated upon a judicial interpretation of the provisions of Section 13(b)(1) of the Fair Labor Standards Act and of the provisions of Section 204 of the Motor Carrier Act, 1935.

Interpretation of those specific sections of the two federal statutes, referred to above, by the Circuit Court of Appeals for the Second Circuit[3] and by the Illinois Supreme Court[4] were reviewed by this Court on Writs of Certiorari at the last term. The cases so reviewed had their inception in suits instituted by employees for recovery of unpaid overtime compensation.[5]

This case had its inception in an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor, upon complaint seeking an injunction[6] to restrain Petitioner from violations of Section 15(a)(1)[7] and Section 15(a)(2)[8] of said Act. The Administrator, on page 6 of his memorandum filed in this cause, invites review by Certiorari of the Circuit Court of Appeals, Sixth Circuit, interpretation of said Federal Stat-

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[3] *Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.*

[4] *Levinson v. Spector Motor Service, 91 L. Ed. 846.*

[5] Under Section 16(b) of the Fair Labor Standards Act.

[6] Under Section 17 of the Fair Labor Standards Act.

[7] See Appendix, p. 62.

[8] See Appendix, p. 62.

utes on the ground that the question is of importance in his administration of the Fair Labor Standards Act.

Such review of a final judgment of the United States Circuit Court of Appeals for the Sixth Circuit is within the jurisdiction of this Court. *(U. S. Code, Title 28, Sec. 347.)*

STATEMENT OF THE CASE

Review by Certiorari is limited by this Court's Order to the second question presented in the Petition for Writ of Certiorari. The second question so presented is whether or not certain of Petitioner's employees, who transport property moving in interstate commerce during a minority of their employment, fall within the exemption provisions of Section 13(b)(1)[9] of the Fair Labor Standards Act and are therefore exempt from the overtime provisions of Sec tion 7[10] of said Act. This requires a further determination as to whether or not such employees perform sufficient duties affecting safety of operation as to bring them within the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service under the provisions of Section 204(a)[11] of the Motor Carrier Act, 1935.

The facts of record were presented to the lower Court in the form of an agreed Stipulation (R. 11-27) and supplement thereto (R. 28-38), here summarized to the extent deemed material to this Court's determination of the specific question to which review by Certiorari is limited.

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[9] See Appendix, p. 61.

[10] See Appendix, p. 61.

[11] See Appendix, p. 65.

Petitioner, an individual, doing business as J. F. Morris Cartage Co., is engaged in a cartage business in the metropolitan area of Detroit, Michigan. He operates approximately fifty trucks, or tractor units, and approximately sixty trailers in such service. He employs approximately sixty persons, of whom some forty are employed as truck drivers and some fourteen others are employed as garage workers, including mechanics. The transportation services are performed wholly within the State of Michigan, being confined within the territorial limits of three counties in Michigan embracing and surrounding the Detroit Metropolitan area (R. 11).

Petitioner operates as a motor common carrier for hire (R. 11), is engaged in a general cartage business and is prepared to render such service to the general shipping public (R. 12). However, on the basis of a detailed examination and analysis of Petitioner's operations during the calendar year 1941 (the calendar year preceding the date of filing of Bill of Complaint) it was determined that approximately 97% of the total revenue derived by Petitioner from such cartage services was received for cartage services performed for two steel corporations located in Ecorse, Michigan (R. 12).

Petitioner's cartage services fall principally into five categories:

A. Approximately 60% consists of transportation of steel from Ecorse steel mills to Detroit manufacturing plants (R. 12), the greater part of which steel is used in the production of goods for subsequent sale and shipment, a substantial portion of which latter goods are shipped in interstate commerce (R. 14).

B. Approximately 35% consists of transportation of steel within or between the Ecorse steel mills for the pur-

pose of further processing in the course of manufacture prior to sale and shipment. An unsegregated portion of such steel is ultimately shipped, directly or indirectly, in interstate commerce (R. 12).

C. Approximately 3% consists of transportation of freight between said Ecorse steel plants and interchange points in the Detroit Metropolitan area such as boat docks, railroad depots, freight terminals and truck terminals. This transportation involves the pickup and delivery of freight moving in continuous transportation in interstate commerce through connection between Petitioner and other interstate carriers. Petitioner's compensation for his portion of the through transportation service is in some instances paid to him by the shipper and in other instances is paid to him by the connecting carrier as a division of the through rate on the transportation movement (R. 13).

D. Approximately 1% consists of transportation of freight from Detroit industrial establishments to said Ecorse steel mills (R. 13).

E. Approximately 1% consists of transportation of miscellaneous freight, in general cartage service, for hire, and for shippers other than said Ecorse steel mills. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D except that it is performed for shippers other than said Ecorse steel mills (R. 13).

While the above analysis is confined to approximations, a more detailed and precise analysis of the transportation operations actually performed by Petitioner's drivers during the calendar year 1941 is disclosed in Exhibits C-1 (R. 24, 25) and C-2 (R. 26, 27). The latter two exhibits reflect an analysis of 19,786 trips of all types performed during 1941 (R. 15), which are segregated categorically as follows:

	Number	Percentage
Total trips[1]	19,786	100%
Pickup trips[2]	464	2.34%
Boat Dock Trips[3]	260	1.31%
Intrastate Trips[4]	19,062	96.35%

(R. 15)

Exhibit C-1 (R. 24, 25) is an analysis, by work weeks, of the type of transportation performed by all of Petitioner's drivers who were employed for eight or more workweeks during 1941. Exhibit C-2 (R. 26, 27) is an analysis, by employees, of the same trips.

Exhibit C-1 discloses that in the average workweek, 1941, 75.6% of Petitioner's drivers were exclusively engaged in interplant trips and 24.4% made one or more pickup or delivery trips or both (R. 16). It also discloses that the number of drivers performing pickup, or boat dock trips, or both, varied from week to week, ranging from a minimum of one driver in the week ending April 12, as against 41 drivers performing interplant movement exclusively, to a maximum of 25 drivers in the week ending September 27, as against 7 drivers performing interplant movements exclusively (R. 24, 25).

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[1] Performed by all truck drivers who were employed 8 or more workweeks during 1941.

[2] Trips of the type described in subparagraphs C or E above which involved movement of goods to or from railroad freight houses or line haul carrier depots.

[3] Trips of the type described in subparagraphs C or E above which involved movements of goods to or from boat docks in Detroit (occurring during open navigation only).

[4] Trips of the type described in subparagraphs A, B and D above and here identified as intrastate trips to differentiate them from the pickup and boat dock trips.

Exhibit C-2 discloses that the average truck driver was exclusively engaged in interplant transportation during 75.6% of the workweeks in 1941. Two truck drivers were exclusively engaged in interplant transportation during their entire 1941 employment. All but two other truck drivers were exclusively engaged in interplant transportation during 50% or more of the 1941 workweeks (R. 16).

Exhibit C-2 also discloses that in the range between the two drivers who performed no pickup or delivery or boat dock trips during their entire 1941 employment and the two other drivers who performed some such transportation in more than one-half of the weeks in their 1941 employment, there was considerable variation in percentages among the remaining drivers who performed interplant transportation exclusively during a majority of their weeks of employment.

Those employees of Petitioner employed as truck drivers, mechanics and as Superintendent of Maintenance have been employed by Petitioner for hours in excess of those prescribed by Section 7[1] of the Fair Labor Standards Act and have received only straight time compensation for such excessive hours, except as hereinafter indicated, contrary to the requirements of Section 7 of said Act (R. 16, 17, 18).

Petitioner's truck drivers are employed under the provisions of a Union Contract (Exhibited in its entirety, R. 29-35, and identified as Exhibit D-1). Such contract establishes a 52 hour workweek and provides for payment of overtime compensation at time and one-half the regular hourly rate for all hours worked in excess of 52 in any

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[1] See Appendix, p. 61.

workweek (R. 31). Subsequently the workweek was established at 54 hours by voluntary agreement between Petitioner and the Union at the request of the Office of Production Management (R. 35, 36, 37, 38). Petitioner's truck drivers have received overtime compensation in conformity with the union agreement, as amended, rather than in conformity with the Fair Labor Standards Act (R. 18). The union contract above referred to covered all union drivers engaged in cartage operations in the Detroit Metropolitan area, whether employed by interstate carriers or by intrastate carriers (R. 19).

ASSIGNMENT OF ERRORS

Petitioner alleges that the United States Circuit Court of Appeals for the Sixth Circuit committed error in its entry of judgment on May 29, 1946, and in its opinion in support of such judgment, in the following particulars:

1. In concluding, as a matter of law, that an employee of a motor carrier for hire must devote a substantial part of his time to the performance of duties affecting the safety of operation of motor vehicles transporting property in interstate commerce before such employee falls within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

2. In finding, as a matter of fact, that no employee of Petitioner did spend a sufficient part of his time in the performance of duties affecting the safety of operation of motor vehicles transporting property in interstate commerce so as to bring such employee within the provisions of Section 13(b)(1) of the Fair Labor Standards Act.

SUMMARY OF ARGUMENT

I. CERTAIN OF PETITIONER'S EMPLOYEES TRANSPORT INTERSTATE FREIGHT.

Petitioner is engaged individually in the transportation of freight as a motor common carrier for hire. He conducts a general cartage service in the Detroit Metropolitan area. The majority of the freight so transported is moving in intrastate commerce (R. 11, 12).

An analysis of 19,786 transportation operations conducted by Petitioner's employees in 1941 revealed that between 3% and 4% of these operations consisted of the picking up or delivery of freight, in the Detroit Metropolitan area, while moving in continuous transportation in interstate commerce. This service is performed either for the shipper or for the connecting carrier (R. 13).

The frequency with which interstate freight pickup and delivery trips were performed in the Detroit Metropolitan area varied from week to week and from employee to employee. Exhibit C-1 and C-2 (R. 24-27).

Transportation operations may be in interstate commerce with crossing state lines. *Motor Carrier Act, 1935, secs. 202(c),*[1] *203(b)(8),*[2] *206(a);*[3] *Ex Parte No. MC 3, 23 M. C. C. 1; Administrative Ruling No. 79.*

Petitioner's employees engagement in interstate commerce was recognized in the lower Court decisions, applicability of the Section 13(b)(1) exemption being denied by the Sixth Circuit on the grounds of lack of substan-

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[1] See Appendix, p. 63.

[2] See Appendix, p. 63.

[3] See Appendix, p. 66.

tiality, rather than on the grounds of complete absence of interstate transportation (R. 48-54).

As a common carrier for hire, Petitioner is required to transport, and may require his employees to handle, interstate freight dependent purely upon the shipping requirements or exigencies of the general shipping public.

Petitioner also employs garage mechanics whose activities may place them within the Section 13(b)(1) exemption.

II. SUCH INTERSTATE TRANSPORTATION IS SUBJECT TO REGULATION UNDER THE MOTOR CARRIER ACT.

Section 202(a),[1] 202(c) and 203(b)(8) of the Motor Carrier Act, when read together, indicate that transportation operations of the type performed by Petitioner in interstate commerce are subjected to federal regulations at least to the extent of compliance with the safety regulations of the Interstate Commerce Commission.

Section 203(b)(9)[2] of the Motor Carrier Act indicates that Congress intended to extend Commission regulation even to casual and occasional motor carrier transportation in interstate commerce by persons not engaged in transportation by motor vehicle as a regular occupation or business. The words "casual" and "occasional" were used by Congress in their generally accepted meaning. *Martin v. United States,* 100 F. (2nd) 490. This indicates that Congress intended to subject motor carrier transportation in interstate commerce to federal regulation irrespective of the volume of interstate traffic carried or the frequency with which such transportation is performed.

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[1] See Appendix, p. 63.

[2] See Appendix, p. 65.

If Congress intended to extend federal regulation to casual and occasional interstate motor carrier operations by persons not regularly engaged in transportation, *a fortiori*, Congress intended to extend federal regulation to motor carriers regularly engaged in transportation irrespective of how casual or occasional were the interstate movements performed.

III. SUCH EMPLOYEES ARE SUBJECT TO THE SAFETY REGULATORY POWER OF THE INTERSTATE COMMERCE COMMISSION.

Section 204(a)[1] of the Motor Carrier Act imposes a duty on, and grants power to, the Interstate Commerce Commission to establish qualifications and maximum hours of service of employees and safety of operation of equipment. This power extends only to those motor carrier employees whose duties affect safety of operation. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534.

Judicial interpretation of Section 204(a) of the Motor Carrier Act is a prerequisite to judicial interpretation of the Section 13(b)(1) exemption. Such interpretation is a judicial function. *United States v. American Trucking Associations, Inc.*, cited *supra*, 544.

However, the safety reports and regulations of the Interstate Commerce Commission, issued before and subsequent to the enactment of the Fair Labor Standards Act, "deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to a specially significant weight in the interpretation of this Act (Motor Carrier Act, 1935) the enforcement of which has been committed by Congress solely to that

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[1] See Appendix, p. 65.

Commission." *Levinson v. Spector Motor Service*, 91 L. Ed. 846, 853.

In its earliest reported motor carrier safety order the Interstate Commerce Commission established initial safety rules and regulations and acknowledged that "first and foremost in the problem of motor vehicle safety is the driver, the man at the wheel." *Ex Parte No. MC 4, 1 MCC 1, 7.* We are here principally concerned with the applicability of the Section 13(b)(1) exemption to drivers because two-thirds of Petitioner's employees are in that classification and review by certiorari is limited to the application of Section 13(b)(1) exemption.

Unlike the situation in *Levinson v. Spector Motor Service*, cited *supra*, where the question involved applicability of the Section 13(b)(1) exemption to a partial-duty loader in advance of Commission adoption of specific qualifications, standards and maximum hours of service, we are here concerned with the applicability of the exemption to full time drivers, whose duties are partial only in the sense that interstate freight is handled a minority of the time. The Commission has established qualifications, standards and maximum hours of service for drivers and "the issue is more obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier." *Levinson v. Spector Motor Service*, cited *supra*, 861.

The Interstate Commerce Commission extends safety regulation to drivers who may spend a majority of their time performing non-driving duties, as for example, drivers engaged in picking up and delivering interstate freight in cities and towns. *Ex Parte No. MC 2, 3 MCC* 665, 671.

The Interstate Commerce Commission has extended its maximum hours of service regulation to drivers of for

hire motor carriers and private motor carriers otherwise exempt by order of the Commission from safety regulations and otherwise exempt from the provisions of the Motor Carrier Act under Section 203(b).

Ex Parte No. MC 4, 10 MCC 533; 14 MCC 669; Ex Parte No. MC 3, 26 MCC 205.

The Interstate Commerce Commission takes the position that application of the overtime compensation provisions of the Fair Labor Standards Act to the hours of service of a motor vehicle driver will have no appreciable effect upon safety of operation because no statutory maximum hours of service limitation is imposed by the Fair Labor Standards Act. Accordingly, in the interest of safety, the Commission takes the further position that its safety regulatory powers, as expressed in its maximum hours of service regulations, extend on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week and extend on an hourly basis to any driver who operates a motor vehicle in the transportation of interstate freight during any one period of 24 consecutive hours. *Ex Parte No. MC 3, 23 MCC 1, 39.*

Lower Court determinations that the Section 13(b)(1) exemption is inapplicable to motor carrier employees unless they devote a substantial part of their time to the performance of duties affecting safety of operation are based upon a misinterpretation of the Commission's findings in *Ex Parte No. MC 2, 28 MCC 125.* Those findings related to *classes* of employees and made no attempt to condition application of the exemption upon the amount of time spent in the performance of safety activities by *individual* employees.

Petitioner's latter interpretation of the Commission's decision in *Ex Parte No. MC 2, 28 MCC 125,* is adopted by this Court's majority in *Levinson v. Spector Motor Service, cited supra, 856.* The fundamental test, adopted by this Court in *United States v. American Trucking Association, Inc., cited supra,* and reaffirmed in the *Levinson* case, is simply that the employee's activities affect safety of operation.

This Court's minority in the *Levinson* case appears to accept the lower court's interpretation of the Commission's decision last above cited, but rejects the Commission's voluntary restriction on its safety regulatory powers on the ground "that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation" (868). In any event, the Commission decision involving these conflicting interpretations did not apply to drivers, the Commission having already concluded that its safety regulatory powers extended to both full-duty and partial-duty drivers.

In extending its maximum hours of service regulation on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week, *Ex Parte No. MC 3, 23 MCC 1, 39,* the Commission uses the designation "week" in the sense of any period of 168 consecutive hours, *Safety Regulations, 47 C. F. R. Cum. Supp., Parts 190* and *191,* rather than in the sense of any given "workweek," the unit for determination adopted by the Administrator of the Wage and Hour Division, *Interpretive Bulletin No. 9, Wage and Hour Manual (1944-1946 ed.) 520, 523.*

The Commission explains that under its Safety Regulations it has adopted a "sliding week" under which it becomes necessary to examine the duties performed by a

driver during the preceding 168 consecutive hours in order to determine his eligibility to drive in interstate commerce at any given time. *Hours of Service Regulations—Application and Interpretation, Administrative Ruling No. 79, C. C. H. Federal Carriers Service, Par. 6079.* Thus a driver engaged in driving in interstate commerce on one day of the Administrator's "workweek" may also be so engaged on one day in two consecutive Commission "sliding weeks."

IV. THE SAFETY REGULATORY POWER OF THE COMMISSION IS NOT AFFECTED BY THE VOLUME, DEGREE, OR FREQUENCY OF SUCH INTERSTATE TRANSPORTATION.

The Section 13(b)(1) exemption is applicable to partial-duty loaders who spend only a portion of their time loading. The applicability of the exemption to drivers is even more obvious "because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loads the freight which the driver is transporting." *Levinson v. Spector Motor Service, cited supra, 860.* Here we are concerned principally with the applicability of the exemption to full time drivers whose full time duties affect safety of operation, interstate or intrastate.

Both this Court's majority and minority in the *Levinson* case are in agreement that the safety program entrusted to the Interstate Commerce Commission by Congress and developed by the Commission should be preserved intact (852). This Court's majority said in the *Levinson* case: It is the character of the activities, rather than the proportion of time spent in those activities that determines the actual need for the Commission's exercise

of its safety regulatory powers (859). Even a partial-duty driver may create a greater safety hazard when he drives than a full time driver (862).

This Court's minority said in the *Levinson* case: Not the amount of time spent in the performance of duties affecting safety, but what is done during the time so spent, determines the effect on safety (865). Ten minutes of driving by an unqualified driver may do more harm on the highway than constant driving by a qualified driver (865). In relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, though the time thus spent is not five minutes daily or weekly (865). It cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effect upon safety (866).

This Court's minority in an early case suggested the possibility of extending the Section 13(b)(1) exemption even to non-carrier employees to thwart partial nullification of the Commission's safety regulatory powers. "We should refuse to whittle down that jurisdiction even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act." *Boutell, et al. v. Walling, 66 S. Ct. 631, 637.*

The Wage and Hour Administrator's interpretation of Section 13(b)(1) as being inapplicable to any motor carrier employee who spends the greater part of a work-week in the performance of non-exempt activities has been rejected in lower court decisions even where applicability of the exemption was denied on the ground of lack of substantiality. *Walling v. Comet Carriers, 151 F. (2d) 107;* certiorari granted, *326 U. S. 716;* Writ dismissed on motion of Petitioner's counsel, *328 U. S. 819.*

The Administrator's interpretation was disregarded by this Court and by the Fourth Circuit Court of Appeals in determining the Section 13(b)(1) exemption to be applicable to a motor carrier employee where the record facts showed a dispute as to whether the employee spent the greater or lesser portion of his time in exempt activities, both courts failing to discuss the Administrator's interpretation in reaching their determination. *Richardson v. James Gibbons Co., 132 F. (2d) 627;* affirmed, *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44.*

The Administrator's interpretation of Section 13(b) (1) is expressly rejected by this Court in the *Levinson* case, cited *supra,* 860; on the ground that the exemption should be interpreted in the light of the Interstate Commerce Commission's interpretation of its safety regulatory powers under Section 204 of the Motor Carrier Act, and the Commission inferentially had rejected the 50% test in its decision in *Ex Parte No. MC 3, 23 MCC 1.* Further, Congress in 1945 failed to act upon an amendment to Section 13(b)(1), proposed by the Administrator, which would have converted the Administrator's interpretation into statutory language.

Rejection of the Administrator's interpretation is even more imperative in considering the applicability of the Section 13(b)(1) exemption to Petitioner's employees in the instant case because we are principally concerned with drivers operating motor vehicles full time in an area of great population density and traffic concentration. Such employees are of a type whose non-qualification under Commission safety regulations is most likely to have an adverse effect upon safety of motor vehicle operation in interstate commerce. This is particularly true where, as employees of a motor common carrier, their handling of interstate freight is principally contingent upon the ship-

ping requirements of the employers' customers, rather than upon the conscious allocation of interstate freight by the carrier employer.

V. SUCH EMPLOYEES ARE EXEMPT FROM THE OVERTIME COMPENSATION PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

In view of the *Levinson* decision, cited *supra*, it appears probable that this Court's entire membership consistently could determine that at least certain of Petitioner's employees are subject to the Commission's safety regulatory powers during at least certain periods of their employment, the Commission having concluded that its maximum hours of service regulations extend on a weekly basis to any driver who operates a motor vehicle in the transportation of interstate freight on any day of a given week. *Ex Parte No. MC 3, 23 MCC 1, 39.*

In the event of such determination, it would seem to follow necessarily that such employees are, by the language of Section 13(b)(1) of the Fair Labor Standards Act, *automatically* excluded from the overtime compensation provisions of Section 7 of said Act. *Levinson v. Spector Motor Service, cited supra, 848, 862.* This Court's minority in the *Levinson* case concedes that a *literal* application of the exemption would result in automatic exclusion from the overtime compensation provisions (865, 866).

The only apparent alternative to exclusion of such employees from the overtime compensation provisions of the Fair Labor Standards Act would be adoption of the proposition suggested by this Court's minority in the *Levinson* case that possibly Congress intended to subject some motor carrier employees to concurrent jurisdiction of the Interstate Commerce Commission and the Adminis-

trator of the Wage and Hour Division, thus preserving the Commission's safety regulatory powers, while extending broad coverage of the Fair Labor Standards Act.

The difficulty with acceptance of this alternative "concurrent jurisdiction" theory in the instant case is that it would require reversal of this Court's previous decisions and would require disregard of the Congressional purpose as elsewhere expressed. It would require reversal of the *Levinson* decision because this Court's majority said, page 852, that "Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." It would also require reversal of *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44, 48-49,* where this Court said, without dissent, "The Amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

In the *Southland Gasoline Company* case this Court made reference to statements on the Senate floor to the effect that the amendment was intended to give motor vehicle operators the same exemption from the Fair Labor Standards Act as that enjoyed by railway employers. *81 Cong. Rec. 7875; 34 Stat. 1415; 39 Stat. 721,* and made reference to the motor carrier industry as "a business requiring fluctuating hours of employment, without the burden of additional pay for overtime" (48).

No reason is apparent why the stated benefits of the exemption should not be extended equally to a motor carrier a majority of whose traffic moves in intrastate commerce; nor why a motor carrier whose freight is predominantly interstate should be regulated by a single federal agency, while a motor carrier whose freight is

predominantly intrastate should be regulated concurrently by two federal agencies.

The Congressional intent to avoid impairment of the Commission's safety regulatory powers through extension of broad coverage of the Fair Labor Standards Act is evidenced by the failure of Congress to adopt the Section 13(b)(1) amendment prposed by the Administrator in 1945 and by the Congressional extension of safety regulation to motor carrier terminal area pickup and delivery in the 1942 amendment to the Motor Carrier Act, after its exclusion in the 1940 amendment to the Motor Carrier Act. *Levinson v. Spector Motor Service, cited supra, footnotes 27 and 10.*

Congress also had economic factors in mind when it extended the benefit of the Section 13(b)(1) exemption to motor carriers and this Court has so recognized. *Southland Gasoline Co. v. Bayley, et al., cited supra.* See also, the language of this Court's majority in *United States v. American Trucking Associations, Inc., 310 U. S. 534, 541, 542,* and the language adopted by this Court's minority in the latter case, being the language of the lower Court in *31 F. Supp. 35, 38.*

The Congressional purpose is further disclosed in its declaration of the National Transportation Policy, originally enacted as a purpose clause in Section 202(a) of the Motor Carrier Act, and later added as Section 102 of the Interstate Commerce Act, subsequent to enactment of the Fair Labor Standards Act. In its declaration of the National Transportation Policy, Congress speaks of "fair and impartial regulation of all modes of transportation," promoting "economical" service, fostering "sound economic conditions in transportation and among the several carriers," discouraging "unfair or destructive competitive practices," and encouraging "fair wages and equitable working conditions."

It is difficult to see how these purposes can be realized if Petitioner, under the "concurrent jurisdiction" theory, is subjected to overtime compensation payments to certain employees for services performed up to a possible 20 hours in an allowable 60 hour week, while competitive motor carriers are relieved from all liability for overtime compensation to employees performing apparently identical tasks. This would place Petitioner at a competitive disadvantage and would, at the same time, place such competitors' employees at an economic disadvantage in comparison with Petitioner's employees. This would tend to increase, rather than to lessen, the irritation of labor discontent. *Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 576.*

Legislative exemption, of necessity, involves classification, but such classification should be reasonable and consistent with the legislative purpose. Basing exclusion from the overtime benefits of Section 7 of the Fair Labor Standards Act, under Section 13(b)(1), upon the mere frequency with which interstate freight is transported will produce an economic differentiation between Petitioner's employees themselves and between Petitioner's employees, on the one hand, and employees of Petitioner's competitors, on the other, the reasonableness of which is not readily apparent in view of the basic similarity of the services performed.

It is not apparent that Congress intended the availability of the Section 13(b)(1) exemption to be progressively defeated as the volume or percentage of a motor carrier's intrastate freight increased in proportion to the interstate freight transported.

ARGUMENT

I. CERTAIN OF PETITIONER'S EMPLOYEES TRANSPORT INTERSTATE FREIGHT.

The facts of record in this case were presented to the Court in the form of an agreed written stipulation (R. 11-27) and supplement thereto (R. 28-38). Petitioner is engaged in business as a motor common carrier for hire, transporting property by motor vehicle in the Detroit Metropolitan area in a general cartage service and is prepared to render such service to the general shipping public (R. 11, 12). However, the great majority of the traffic handled by Petitioner is transported in intrastate commerce for the principal account of two steel corporations located in Ecorse, Michigan (R. 12).

For purposes of analysis, Petitioner's transportation operations were examined for the calendar year 1941 and it was agreed that these operations fell into five principal categories. Of these principal categories, the third category, designated as "C," indicates that approximately 3% of Petitioner's operation consists of the transportation of freight between the Ecorse Steel Plant and interchange points in the Detroit Metropolitan area such as boat docks, railroad depots, freight terminals and truck terminals. Transportation of the latter category involves the picking up of freight which is moving in interstate commerce in continuous transportation, Petitioner being one of the participating carriers. In some instances Petitioner is paid for his portion of the transportation service by the shipper and in other instances Petitioner's compensation represents a division of the through rate on the transportation movement, paid to him by the collecting interchange carrier (R. 13).

The fifth category of operations, designated as "E," indicates that approximately 1% of Petitioner's operations consists of the transportation of miscellaneous freight in general cartage service for shippers other than the two principal accounts in Ecorse. An unsegregated portion of this latter transportation also involves pickup and delivery of freight moving in interstate commerce, similar to the movement described in category "C" (R. 13).

The foregoing analysis of operations conducted by Petitioner during the year 1941 covered an examination of 19,786 trips of all types. This examination revealed that interstate freight was transported on trips in excess of 3½% of the total trips. The exact percentage appears to be 3.65 but there is room for variation in this percentage figure by virtue of the fact that only trips performed by employees who were employed for a period of eight or more weeks during the year 1941 were analyzed (R. 15).

Exhibit C-1 (R. 24, 25) constitutes an analysis by weeks of the foregoing trips. It discloses that in the average workweek throughout the entire year 1941, nearly one quarter of Petitioner's truck drivers made one or more trips involving the transportation of interstate freight. The percentage of drivers so engaged varied from week to week and in some six workweeks there were more drivers who handled interstate freight than drivers who did not.

Exhibit C-2 (R. 26, 27) constitutes an analysis by employees of the foregoing trips. It discloses that the "average truck driver" handled interstate freight on at least one or more trips in nearly one quarter of the total workweeks during the calendar year 1941. The number of trips performed by each driver in the handling of interstate

freight varied from driver to driver, some two drivers having never handled any interstate freight and some two other drivers having handled interstate freight in a majority of the workweeks.

While all of Petitioner's transportation operations have been physically intrastate, it is generally recognized that a carrier does not have to operate across state lines to be engaged in interstate commerce. Congress clearly recognized this fact in its enactment of the Motor Carrier Act, 1935. Section 206 of the Motor Carrier Act requires all common carriers by motor vehicle to secure certificates of public convenience and necessity from the Interstate Commerce Commission but section 206(a)[1] specifically provides that the securing of such certificate shall not be required of any carrier which is lawfully engaged in the transportation of passengers or property in interstate or foreign commerce between places solely within any state if there be a board in such state having authority to grant or approve such certificate and if such carrier has obtained such certificate from such board. "Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Further recognition of the fact that interstate traffic can be handled in movements physically intrastate can be found by implication in the provisions of Section 202(c)[2] and Section 203(b)(8)[3] of the Motor Carrier Act. Section 202(c) extends safety regulation to motor carrier pickup and delivery service in terminal areas and Section 203 (b)(8) extends safety regulation to the transportation of passengers or property in interstate or foreign commerce

[1] See Appendix, p. 66.

[2] See Appendix, p. 63.

[3] See Appendix, p. 64.

wohlly within a municipality, or between contiguous municipalities, or within a zone adjacent to and commercially a part of any such municipality, except when such transportation is under common control, management or arrangement for continuous carriage or shipment to or from a point without such municipalities or zone. Obviously terminal areas and municipal areas far removed from state boundaries are covered by the provisions of the latter two sections of the Act.

In *Ex Parte No. MC 3, 23 MCC 1,* the Interstate Commerce Commission stated at page 13:

> "It is entirely clear that the physical operation of a truck in the transportation of property from one state to another is not the sole test of whether it is engaged in interstate and foreign commerce. Under the decisions of the Supreme Court of the United States a carrier may operate physically within the limits of a single state and yet be engaged in interstate or foreign commerce."

In Interstate Commerce Commission *Administrative Ruling No. 79, C. C. H. Federal Carrier Service, Par. 6079,* issued May 16, 1939, the following question and answer appeared:

> "Question No. 2: Does a motor vehicle have to cross a state line in order to be engaged in interstate commerce?"
>
> "Answer: No. The interstate character of the shipment may make the trip legally one in interstate commerce, even though the trip is wholly within the boundaries of one state."

Recognition that Petitioner performs some interstate carriage and that some of Petitioner's employees handled interstate freight is also evidenced by the opinion of the Circuit Court of Appeals for the Sixth Circuit in this

case in that the availability of the Section 13(b)(1) exemption was denied, not on the basis that no movements in interstate commerce were shown, but rather on the basis that the frequency with which property was transported in interstate commerce was not of sufficient substantiality to place any of Petitioner's employees within the exemption provision (R. 48-54).

It should also be observed that Petitioner operates as a common carrier for hire, offering a general cartage service to the general shipping public. Petitioner's undertaking as a common carrier imposes upon him the legal compulsion to handle freight as tendered by the shipping public without discrimination. Whether the freight so tendered is to move in intrastate commerce or in interstate commerce and the volume or proportion of freight so moving depends upon the shipping requirements or other exigencies of the shipper rather than upon voluntary selection of traffic by Petitioner. Accordingly, the percentage or volume of interstate freight handled in any given period will vary on the basis of circumstances beyond the control of Petitioner.

For similar reasons, the volume or percentage of interstate freight transported by any particular employee of of Petitioner is likely to be more dependent upon the requirements of the shipper than the voluntary action of Petitioner. This is evidenced by Exhibit C-2 which shows considerable variation in the number of interstate trips performed by the individual employees of Petitioner. The fact that two of Petitioner's truck drivers, as is indicated in Exhibit C-2, perform no interstate trips in the calendar year 1941 is compelling evidence that the handling of freight in interstate commerce is based upon happenstance and that Petitioner did not consciously spread the interstate trips among the various employees in order to invoke the Section 13(b)(1) exemption.

The stipulation also reveals that Petitioner employs some fourteen garage workers, including mechanics (R. 11). The stipulation fails to disclose the percentage of time spent by these mechanics and by the superintendent of maintenance in the repair of the motor vehicles used to transport the interstate freight referred to above. It would appear, however, that if the amount of freight transported in the motor vehicle equipment of Petitioner is considered sufficient to place the truck drivers within the jurisdiction of the Interstate Commerce Commission, the mechanics who repair those trucks may also fall within the jurisdiction of the Interstate Commerce Commission.

II. SUCH INTERSTATE TRANSPORTATION IS SUBJECT TO REGULATION UNDER THE MOTOR CARRIER ACT.

Section 202(a)[1] of the Motor Carrier Act, 1935, states that

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *."

Section 203(b)[2] of the Act provides that no provisions of the Act except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall apply to:

> "(8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except

[1] See Appendix, p. 63.

[2] See Appendix, p. 64.

> when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, * * *"

unless the Commission finds that application of the other provisions of this Act is necessary to carry out the National Transportation Policy. Paragraph 202(c)[3] of the Act states that

> "Notwithstanding any provision of this Section or of Section 203, the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees in safety of operation and equipment, shall not apply—
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental."

Petitioner is engaged solely as a motor common carrier in the transportation of property. He is principally engaged in the transportation of property by motor vehicle in intrastate commerce. However, to the degree indicated in the preceding analysis, Petitioner is engaged in the transportation of property by motor vehicle in interstate

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[3] See Appendix, p. 63.

commerce. If it were not for the provisions of Section 202(c) and Section 203(b)(8), Petitioner would be subject to full regulation by the Interstate Commerce Commission under the provisions of Section 202(a) of the Act. It is apparent, however, that Petitioner's principal business consists of the transportation of property wholly within a single municipality or within a zone adjacent to and commercially a part of such municipality, namely, the Detroit Metropolitan Area. Whether such transportation is conducted under common control, management or arrangement for a continuous carriage to or from a point without such municipality or zone or is not is not readily apparent from the stipulation. However, this does not appear important in view of the fact that both paragraphs 202(c) of the Act and 203(b) of the Act, Petitioner is subjected to safety regulation by the Interstate Commerce Commission.

The intent of Congress to extend safety regulation to all transportation of passengers or property in interstate commerce, irrespective of the volume of interstate traffic carried or the frequency with which it is carried, is evidenced by the provisions of Section 203(b) (9)[1] of the Motor Carrier Act. The latter provisions, similar to the provisions of Section 203(b)(8), provide that none of the provisions of this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to:

> (9) "The casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * *,"

[1] See Appendix, p. 65.

unless the Commission finds that application of the other provisions of the Act is necessary to carry out the National Transportation Policy.

It has been held that Congress used the words "casual," "occasional," "reciprocal," "regular," "occupation" and "business" in their generally accepted meaning. *Martin v. United States, 100 F. (2d) 490.* If Congress intended, as is evident, to extend the safety jurisdiction of the Interstate Commerce Commission to even the casual, occasional or reciprocal transportation of passengers or property, by motor vehicle, in interstate commerce, for compensation, by persons not even engaged in the business of transportation by motor vehicle, *a fortiori,* Congress certainly intended to subject to regulation even the most casual or occasional interstate transportation of property or passengers by any motor carrier, such as Petitioner, engaged exclusively in the business of transporting passengers or property by motor vehicle.

III. SUCH EMPLOYEES ARE SUBJECT TO THE SAFETY REGULATORY POWER OF THE INTERSTATE COMMERCE COMMISSION.

Section 204(a)[2] of the Motor Carrier Act, 1935, imposes upon the Interstate Commerce Commission a duty to regulate common carriers by motor vehicle and gives the Commission power to establish qualifications and maximum hours of service of employees and safety of operation and equipment. The Commission's safety regulatory powers under Section 204 of the Motor Carrier Act extend only to those motor carrier employees whose duties affect safety of operation. *United States v. American Trucking Associations, Inc., 310 U. S. 534.* Judicial interpretation of the

[2] See Appendix, p. 65.

provisions of Section 204(a) of the Motor Carrier Act is a prerequisite to judicial interpretation of the provisions of Section 13(b)(1) of the Fair Labor Standards Act. "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *United States v. American Trucking Associations, Inc., 310 U. S. 534, 544.* However, the safety reports and regulations of the Interstate Commerce Commission, issued both before and after enactment of the Fair Labor Standards Act, "deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle them to a specially significant weight in the interpretation of this Act (Motor Carrier Act, 1935) the enforcement of which has been committed by Congress solely to that Commission." *Levinson v. Spector Motor Service, 91 Law Ed, 846, 853.*

The safety reports and regulations of the Interstate Commerce Commission are thoroughly summarized and analyzed in the *Levinson* decision. Many of the observations made by this Court in such process are not material to a decision of the issues in this case because in the *Levinson* case it was necessary to determine whether the Commission's regulatory power over safety was extensive enough to cover partial-duty loaders in advance of the adoption of specific qualifications, standards and maximum hours of service. In the instant case we are concerned principally with full-time drivers, who can be considered partial-duty drivers only in the sense that they are partially engaged in the transportation of intrastate freight and partially engaged in the transportation of interstate freight. Further, the Commission has already established standards of qualification and maximum hours of service for drivers, that being one of the earliest, and principal, items of consideration in the Commission's adoption of its safety program.

In the Commission's earliest reported decision relative to safety regulations for motor carriers, *Ex Parte No. MC 4, 1 MCC 1, 7,* the Commission established its initial rules and regulations governing qualifications of employees and safety of operation of equipment of for-hire motor carriers and stated "We recognize that first and foremost in the problem of motor vehicle safety is the driver, the man at the wheel." In the instant case we are principally concerned with the application of the Section 13 (b) (1) exemption to drivers in view of the fact that approximately two thirds of Petitioner's employees, whose activities are referred to in the stipulation of facts, are drivers and because of the further fact that review by certiorari in this case has been limited to the applicability of the Section 13(b)(1) exemption.

This distinguishing factor, between drivers and loaders, was recognized by this Court in the *Levinson* decision, the Court saying:

> "The principle to be applied is the same in the case of the loader as in that of the driver, although the issue is more obvious when the test of jurisdiction is applied to the driver than when applied to any other class of employees of the motor carrier. This is because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loaded the freight which the driver is transporting. Furthermore, in the case of the driver, the Commission not only has found that it has the power to establish, but it actually has established, tested and revised, a set of qualifications for his service and a maximum limitation on the aggregate number of hours during which he safely may be permitted to drive during any period of 24 consecutive hours. It also has established a maximum limitation on the number of hours during any 'week' of 168 consecutive

hours during which such a driver safely may be permitted to be 'on duty,' even though many of his activities and much of his time while 'on duty' may not affect safety of operation of the carrier.''

Levinson v. Spector Motor Service, 91 Law Ed. 846, 860, 861.

In *Ex Parte No. MC 2, 3 MCC 665, 671,* the Commission stated that it had established maximum hours of service in order to eliminate unsafe conditions associated with driver fatigue and gave affirmative recognition to the fact that many drivers spend part of their time performing duties other than driving, particularly drivers engaged in picking up and delivering interstate freight in cities and towns. This indicates that the Commission interprets its safety regulatory powers under Section 204(a) of the Motor Carrier Act to include regulations of the maximum hours of drivers engaged in the performance of the type of transportation service in which Petitioner's drivers were engaged, as indicated in the stipulation of facts.

In *Ex Parte No. MC 4, 10 MCC 533, 534,* the Commission made the observation that motor vehicles used in the performance of the type of exempt operations covered by Section 203(b)(8) of the Motor Carrier Act, the type of exempt operation in which Petitioner is principally engaged, are as susceptible to accidents as are motor vehicles operated by non-exempt carriers. After the Commission's hours of service regulations became effective on March 1, 1939, the Commission in *Ex Parte No. MC 4, 14 MCC 669,* extended the maximum hours of service regulations to employees of carriers exempt under the provisions of Section 203(b) of the Motor Carrier Act, but excluded such exempt carriers from its remaining safety regulations. Similarly in *Ex Parte No. MC 3, 26 MCC 205,* the Commission extended its exemption from safety regulation to employees of private

carriers but did not exempt such employees from the maximum hours of service regulations.

In *Ex Parte No. MC 3, 23 MCC 1,* the Commission expressly recognized the possible conflict between its jurisdiction over motor carrier employees, under the provisions of Section 204 of the Motor Carrier Act, and the jurisdiction of the Administrator of the Wage and Hour Division, under the provisions of the Fair Labor Standards Act. At page 11 of that report the Commission directed attention to the fact that the only limitations in the Fair Labor Standards Act upon the hours of drivers is the requirement that overtime compensation be paid if the driver is employed for hours in excess of those prescribed in Section 7. If such overtime compensation is paid, there is no statutory limit on the number of hours a driver may be required to drive. The Commission then stated,

> "Admittedly, the overtime wage penalty should result in a shortening of weekly hours, but the fact remains that, insofar as the statute is concerned, a private carrier of property could require and permit an employee to drive a motor vehicle in interstate or foreign commerce for long and dangerous hours, provided only that additional wages were paid. In our opinion, this would be clearly unsafe."
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> "Attention is further directed to the fact that the Fair Labor Standards Act would in no way affect the daily hours which a driver might be required to drive or operate a motor vehicle. Even though a driver may have a short week, it nevertheless is highly dangerous that he may be required to drive a motor vehicle on the crowded highways of the country for excessive hours in any one day."

At page 21 of the latter report the Commission stated that no good reason had been suggested, and that it could conceive of no good reason, why the same regulations gov-

erning maximum hours of service of drivers and safety of operation and standards of equipment of motor vehicles should not be made applicable to all types of carriers. It conceded that there should be some modification of its maximum hour regulations in those instances where drivers for private carriers spent more than fifty percent of their time in the performance of activities other than driving. But even here, the Commission reached a determination that such latter drivers should not be exempt from the maximum hours provisions of its safety regulations, but merely that those provisions should be modified. (See page 31 of the report.)

At page 39 of the same report the Commission makes the following statement:

> "We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise, if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week. We express no opinion as to whether or not during that week the driver is subject to the provisions of Section 7 of the Fair Labor Standards Act."

The above quoted interpretative decisions of the Interstate Commerce Commission would indicate that the Commission feels that its safety regulatory powers under Section 204 of the Motor Carrier Act extend even to the most trivial or occasional performance of activities affecting safety of operation by employees who may spend a majority of their time in the performance of duties which do not affect safety of operation. However, a number of Courts, including the Sixth Circuit Court of Appeals in the instant case, *155 Fed. (2nd) 832,* have reached a determination that the Section 13(b)(1) exemption is not applicable to motor carrier employees unless they devote a substantial part of their time to the performance of duties affecting safety of operation. Many of these courts have based their determination upon an alleged finding by the Interstate Commerce Commission in *Ex Parte No. MC 2, 28 MCC 125,* that the Commission's power under Section 204(a) of the Motor Carrier Act extends only to employees "who devote a substantial part of their time to activities which directly affect the safety of operation."

It is respectfully submitted by Petitioner that the Commission's decision in *Ex Parte No. MC 2, 28 MCC 125,* when read in its entirety, is not subject to the construction which has been placed upon it by such Courts. In the latter decision the Commission was seeking to determine what motor carrier employees, other than drivers, performed such duties affecting safety of operation as to place them within the jurisdiction of the Commission. The Commission made certain findings and drew certain conclusions from those findings. The net result was that the Commission reached a determination that mechanics, loaders, and helpers, as a class, perform duties affecting safety of operation and are therefore within the jurisdiction of the Commission. On the contrary, the Commission reached a determination that certain other classes of employees, such as

dispatchers, did not perform duties affecting safety of operation and were not subject to the Commission's safety regulatory powers. In speaking of "substantial time," it is believed to be apparent from the Commission's entire decision that it was speaking of employees by classes and was not referring to a specific analysis of the amount of time spent by individual employees in the performance of duties affecting safety of operation.

This distinction appears to be fully recognized by this Court's majority in the *Levinson* decision. At page 856 of the official Law Edition report this Court's majority observes that in the absence of any discussion or classification, on a time basis, of the several activities of loaders, the finding with respect to them amounted to another way of saying that a large part of a loaders' activities affect safety of operation. This Court observes that there is nothing to indicate that the Commission uses the element of time other than as representative of the continuing work period, during all of which the loader is devoting himself to the activities of his job as a loader. At page 857 this Court observes that the decision of the Commission tacitly recognizes that even a full-duty loader may engage in some activities which do not affect safety of operation and that such non-safety activities may make up a large part of the loader's total activities and may even constitute a larger part of his activities than his safety affecting activities. This Court's majority then summarizes its observations with the statement that the fundamental test is simply that the employees' activities affect safety of operation, and refers to this test as the one prescribed by this Court in *United States v. American Trucking Associations, cited supra.*

This Court's minority in the *Levinson* case appears to be in agreement with those lower courts who interpret the

Commission's decision in *28 MCC 125* as a voluntary restriction upon its safety regulatory powers. However, this Court's minority rejects such conclusion by the Commission, stating at page 868 of the official Law Edition report "In adopting 'substantial time' rather than 'substantial effect,' I agree that the Commission has ruled too narrowly" and adds "Accordingly, I conclude, independently of its formal determination, that the full and adequate performance by the Commission of the safety function conferred by the Motor Carrier Act requires the larger scope which the Court's ruling allows for its operation."

Thus it appears questionable whether the Commission intended to restrict its safety regulatory powers to motor carrier employees who spend "substantial time" in the performance of duties affecting safety of operation. However, if the Commission's decision is capable of such construction, it obviously is in conflict with the Commission's determination in *23 MCC 1, 39, cited supra,* and the restrictive determination is rejected by both the majority and the minority of this Court. In any event, such restrictive determination is inapplicable to the instant case because the determination did not relate to the activities of truck drivers, the Commission having already concluded that its safety regulatory powers extended to drivers of motor vehicle equipment, both full-duty and partial-duty drivers.

Referring once again to the Commission's decision in *Ex Parte No. MC 3, 23 MCC 1,* it is apparent that the Commission does not believe that it can maintain an adequate safety program unless it extends its safety regulations to drivers who handle interstate freight, irrespective of the volume of interstate freight handled or the frequency with which it is handled. In this connection it is important to observe that when the Commission speaks of its safety

regulatory powers extending to a motor carrier employee who performs duties affecting safety of operation once during a given week, it is not speaking of the "workweek" adopted by the Administrator of the Wage and Hour Division, United States Department of Labor.

The regulations of the Administrator of the Wage and Hour Division are all predicated upon the so-called "workweek."[1] The Interstate Commerce Commission in its safety regulations defines a "week" as any period of 168 consecutive hours.[2] The Commission explains what it means by a consecutive 168 hour period week in its Administrative Ruling No. 79, issued May 16, 1939.[3] In the form of a number of questions and answers the Commission states that a driver is limited by the regulations for 60 hours "on duty" in any period of 168 consecutive hours (7 days) beginning at the time the driver reports for duty. If a driver is on duty in interstate commerce for the permissible 60 hours in the first five days of a calendar week, he can then work additional hours in intrastate commerce during the remaining two days but this additional time must be taken into consideration if and when he returns to driving or other work in interstate commerce. In other words, work performed during the preceding seven days must be reviewed in order to determine whether the driver may legally operate in interstate commerce on the eighth day. The Commission, in its Administrative Ruling, states that this is an example of the Commission's "sliding week,"

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[1] Interpretative Bulletin No. 9, October 1, 1943, Wage and Hour Manual (1944-1945 ed.) 520, 523.

[2] Safety Regulations for carriers by motor vehicle, 47 C. F. R. Cum. Supp., Part 190—General definitions; Part 191—Hours of Service.

[3] Hours of Service Regulations—Application and Interpretation; Administrative Ruling No. 79; reported in C. C. H. Federal Carriers Service, paragraph 6079.

made necessary by its safety regulations, which insures that a driver in interstate commerce will have adequate periods off duty if he is to continue to work in interstate commerce.

Thus, in order to determine whether a driver has performed duties affecting safety of operation in interstate commerce during the Commission's "week," it is necessary to give consideration to the duties performed during the preceding 168 hours and also during the ensuing 168 hours; whereas under the Administrator's "workweek," it is only necessary to examine the pay period. Thus, let us assume that a driver is employed on a "workweek" basis, his compensation being payable on a calendar week basis for services performed from Monday morning to Saturday night, and he handles interstate freight on a single day, namely Wednesday, in the calendar week. In such event, the driver has performed services affecting safety of operation once during the Administrator's "workweek," commencing Monday morning and terminating Saturday night, but he has also performed services affecting safety of operation in the Commission's "week" commencing 168 hours prior to Wednesday and terminating 168 hours after Wednesday. Thus he performed interstate transportation services in the Commission "week" commencing on Thursday of the calendar week before the services were performed and also in the Commission "week" terminating Tuesday night in the calendar week after the services were performed.

IV. THE SAFETY REGULATORY POWER OF THE COMMISSION IS NOT AFFECTED BY THE VOLUME, DEGREE, OR FREQUENCY OF SUCH INTERSTATE TRANSPORTATION.

In *Levinson v. Spector Motor Service*, cited *supra*, this Court found the Section 13(b)(1) exemption applicable to a "checker" or "terminal foreman," a substantial part of whose activities in that capacity consisted of doing, or immediately directing, the work of one or more "loaders" of freight for an interstate motor carrier, as such class of work is defined by the Commission. In that case this Court determined that the Section 13(b)(1) exemption was applicable to partial-duty loaders as well as full-duty loaders, as is evidenced by the fact that the affected employee, Levinson, as a checker or terminal foreman, spent only a portion of his time in the performance of loading activities. This determination was reached even though the Interstate Commerce Commission had not as yet established qualifications or maximum hours of service for loaders.

Had Levinson been a driver rather than a loader, the safety jurisdiction of the Interstate Commerce Commission and the applicability of the Section 13(b)(1) exemption would have been even more obvious, "because the driver's work more obviously and dramatically affects the safety of operation of the carrier during every moment that he is driving than does the work of the loader who loads the freight which the driver is transporting."

In the instant case we are principally concerned with the applicability of the Section 13(b)(1) exemption to full time drivers. The facts of record do not reveal that the Petitioner's drivers perform any duties other than driving. In this sense they are full time drivers. They are only partial-duty drivers in the sense that they drive a minority of their time transporting interstate freight and drive a majority

of their time in transporting intrastate freight. Their total performance of duties during on duty hours involves safety of operation, whether interstate or intrastate.

The principal basis for the *Levinson* decision appears to lie in this Court's determination that the safety program entrusted to the Interstate Commerce Commission by Congress and gradually developed by the Commission through the years should be preserved intact. This observation finds support in the following statements in the majority opinion: That Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936 (852); that it is essential to the Commission's safety program, whenever and wherever hazardous activities are engaged in that affect safety of operation of an interstate motor carrier, that those who engage in them shall be qualified to do so and that maximum hours of service affecting such safety of operation shall be established and enforced (856); that this requires the retaining, rather than the relinquishing, of the Commission's jurisdiction over even partial-duty drivers and partial-duty loaders (856); that the fundamental test is simply that the employees' activities affect safety of operation, that being the test prescribed by this Court in *United States v. American Trucking Associations, 310 U. S. 534,* here affirmed; that it is not a question of fundamental concern whether or not it is the larger or the smaller fraction of the employee's time or activities that is devoted to safety work, because it is character of the activities, rather than the proportion of either the employee's time or of his activities, that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment (859); that while the work of a full-duty driver may affect safety of operation during only that part of the time

while he is driving, yet, as a practical matter, it is essential to establish reasonable requirements with respect to his qualifications and activities at all times in order that the safety of operation of his truck may be protected during those particular hours or days when, in the course of his duties as a driver, he does the particular acts that directly affect the safety of its operation (859); and that from a safety standpoint, a partial-duty driver who drives 30 hours continuously and then drives no more during that week creates a greater hazard than the man who drives ten hours daily for six days a week (862).

Even the minority opinion in the *Levinson* case reveals a unanimity of opinion as to the paramount importance of preserving the safety jurisdiction of the Interstate Commerce Commission, as is evidenced by the following statements from the minority opinion: That, factually speaking, not the amount of time an employee spends at work affecting safety, but what he may do in the time thus spent, whether it be large or small, determines the effect on safety (865); that ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one (865); that it would seem essential to effective safety control by the Commission that it should have power to determine the qualifications and maximum hours of service of all employees whose work substantially affects safety, whether or not they spend what may be found to be less than a "substantial" amount of time in that sort of work (865); that anything less than this would open the door to the greatest danger to motor traffic from casual, unqualified drivers or other employees whose work affects safety (865); that the "safety first" view of the Commission's power should be accepted and that this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it

to any extent, though the time thus spent is not five minutes daily or weekly (865); that all employees who do any part of certain kinds of work, for however short a time, regularly or casually, fall within the Commission's powers (865); that a person who spends ten minutes a day or an hour a week in driving or in mechanically repairing trucks, and the remaining thirty-nine hours of a forty hour week in work having no effect upon safety, falls within the Commission's authority (866); that it cannot be held that the comparatively minute amount of time spent in work affecting safety is trivial or inconsequential in its possible effect upon safety (866); and that "substantial effect" upon safety, rather than "substantial time" spent in doing work affecting it, determines the scope of the Interstate Commerce Commission's safety powers (868).

In an earlier and materially significant minority opinion of this Court the theory was advanced that possibly mechanics, employed not directly by a motor carrier but rather by a separate service establishment under common ownership, should be declared subject to the Commission's safety regulatory powers in order to prevent partial nullification of the power of the Interstate Commerce Commission to deal with the problem of safety. Said the author of the latter minority opinion, "We should refuse to whittle down that jurisdiction, even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act." *Boutell, et al. v. Walling, 66 S. Ct. 631, 637.*

At the time of this Court's decision in the *Levinson* case, the Administrator of the Wage and Hour Division had taken and was taking the position that a motor carrier

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[20] Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, par. 4b, November, 1943, 1944-1945. W. H. Man. 520, 523.

employee fell outside the scope of the Section 13(b)(1) exemption if he spent the greater part, or more than 50%, of his working time in the performance of activities not affecting safety of operation.

Prior to the *Levinson* decision, this position of the Administrator had been at least questioned and in some instances rejected even in cases where a determination was made that the motor carrier employee did not fall within the scope of the Section 13(b)(1) exemption because he had not devoted substantial time to the performance of duties affecting safety of operation. (See *Walling v. Comet Carriers, 151 F. (2nd) 107;* Certiorari granted, *326 U. S. 716;* Writ of Certiorari dismissed on motion of counsel for Petitioner, *328 U. S. 819*). In the *Comet* case the Second Circuit Court of Appeals states that the Administrator's interpretation, as reflected in Interpretive Bulletin No. 9 should be rejected; that the Section 13(b)(1) exemption cannot be construed so loosely; and that the exemption section contains no language limiting the power of the Commission to employees who are engaged in interstate commerce for the greater part of the working time in any one workweek.

In this connection note the decision in *Richardson v. James Gibbons Co., 132 Fed. (2nd) 627;* affirmed by the Supreme Court in *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44.* In the *Richardson* case there was a conflict in testimony as to whether Richardson spent more or less than 50% of his time in the performance of activities affecting safety of operation. However, both the Fourth Circuit Court of Appeals and this Court determined that the Section 13(b)(1) exemption was applicable to Richardson without comment on the amount of time devoted by Richardson to the performance of duties affecting safety of operation.

In the *Levinson* decision the Administrator's interpretation of Section 13(b)(1) is expressly rejected, largely on the ground that Section 13(b)(1) involves an exception which is not to be measured by regulations of the Administrator, but which is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to the provisions of the Motor Carrier Act (860). In *Ex Parte No. MC 3, 28 MCC 1*, the Interstate Commerce Commission had already given consideration to the fact that some drivers spend more than fifty percent of their time performing activities other than driving but still extend maximum hour regulation to such latter partial-duty drivers. In accepting the Commission's interpretation of its power and rejecting the Administrator's interpretation of Section 13(b)(1), this Court points out in the Levinson decision that

> "The fundamental and ever recurring difficulty with the Administrator's interpretation of the scope of Section 7 of the Fair Labor Standards Act is that to the extent that he expands the jurisdiction of the Fair Labor Standards Act he must reduce the jurisdiction of the Commission under the Motor Carrier Act, whereas he has no authority to do so (863)."

In further support of its determination that the Administrator's interpretation of Section 13(b)(1) was not in conformity with the congressional intent, this Court in the *Levinson* decision points out in Footnote 27 (P. 864) that in 1945 the Administrator recommended certain amendments to the Fair Labor Standards Act, one of which would have resulted in an amendment to Section 13(b)(1) so as to provide that the provisions of Section 7 should not apply with respect to any employees "who during the greater part of any workweek" are engaged in work with respect to which the Interstate Commerce Commission "has established qualifications and maximum hours

of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935." The proposed amendment was eliminated from the Senate Bill and was never included in the House Bill and neither the Senate nor the House Bill contained the proposal when Congress adjourned.

The safety principles enunciated by this Court in the *Levinson* decision, in determining the applicability of the Section 13(b)(1) exemption to a motor carrier employee on the basis of his being a partial-duty loader, should apply with even greater strength to those employees of Petitioner here under consideration. Petitioner's truck driver employees are full-time drivers and the stipulation is silent as to their performing any duties other than duties affecting safety of operation. True, the safety of operation so affected principally concerns the movement of intrastate freight and to a lesser extent concerns the movement of interstate freight. However, it should be fairly obvious that a motor carrier employee who spends his entire time driving a motor vehicle, particularly in an area involving such population density and traffic concentration as the Detroit Metropolitan area, is the type of employee whose non-qualification or non-observance of the Commission's maximum hours of service regulation is most likely to have an adverse effect upon safety of operation of motor vehicle equipment. Such an employee, in the normal course of conduct of a transportation enterprise, is the one most likely to find himself performing duties subject to Interstate Commerce Commission regulation. This is strongly evidenced by Exhibits C-1 and C-2 (R. 24, 25, 26, 27) which disclose a total lack of uniformity in the allocation of trips involving the transportation of interstate freight among the various employees of Petitioner. This demonstrates that not one, or any certain few, of Petitioner's truck drivers should

be required to meet the Commission's qualifications and maximum hours of service regulations, but that all of them should meet such qualifications and should conform to such regulations because of the continuing possibility that they will be called upon to transport interstate freight at any given moment in the usual and normal performance of their truck driving duties for a carrier who holds himself out as a common carrier to the general shipping public.

V. SUCH EMPLOYEES ARE EXEMPT FROM THE OVERTIME COMPENSATION PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

In the light of the *Levinson* decision, it appears probable that the entire membership of this Court consistently could reach a determination that at least certain of Petitioner's employees are subject to the safety regulatory powers of the Interstate Commerce Commission during at least certain periods of their employment. The Interstate Commerce Commission, in its decision in *Ex Parte No. MC 3, 23 MCC 1, 39,* has expressed the opinion that if a driver operates a motor vehicle in the transportation of interstate freight on any day of a given week, such driver is subject to the weekly maximum prescribed in the Commission's regulations and if a driver is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum prescribed in the Commission's safety regulations.

This Court's majority in the *Levinson* decision commented at page 853 on the fact that the safety reports and regulations of the Commission, issued both before and after the enactment of the Fair Labor Standards Act, deal so thoroughly and expertly with the safety of operation of interstate motor transportation as to entitle the

Commission's findings to significant weight in the interpretation of the exemption. At page 858, this Court's majority said that it saw no reason to question the Commission's conclusion that the activities of full-duty drivers affect safety of operation. At page 859, this Court's majority expressed the opinion that motor carrier employees should be kept within the jurisdiction of the Commission's safety program even where their safety duties were only partial-duties. This Court's minority in the *Levinson* decision agreed with the Court's majority as to the "safety first" view of the Commission's power, stating at page 865 that this requires acceptance of the view that, in relation to some kinds of work, the Commission has power to prescribe the qualifications of all employees who engage in it to any extent, even though the time thus spent was not five minutes daily or weekly. Driving and the work of mechanical repair of trucks were cited as obvious examples.

Assuming that this Court will reach such consistent determination that certain of Petitioner's employees are subject to the safety regulatory powers of the Commission at least during certain periods of their employment, it would seem to follow necessarily that such employees during such periods are expressly and explicitly exempt from the overtime compensation provisions of Section 7 of the Fair Labor Standards Act. Section 13(b)(1) of the Fair Labor Standards Act so states literally.

In the second paragraph of the *Levinson* decision this Court stated, "We hold that the Commission has that power (to establish qualifications and maximum hours of service for a partial-duty loader) and that Sec. 13(b)(1) of the Fair Labor Standards Act therefore expressly excludes any such employee from a right to the increased pay for overtime service prescribed by Section 7 of that Act."

On page 862 of the official Law Edition report, this Court's majority stated that Levinson's activities affected safety of operation and that as a consequence, "he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of Section 13(b)(1) of the Fair Labor Standards Act, that he is excluded, automatically, from the benefits of Section 7 of that Act."

This Court's minority in the *Levinson* decision admits (page 865) that "Read literally, in the light of the *Southland* decision, the section would exempt all employees who do any work affecting safety operations * * *." Again on page 866 this Court's minority admitted that an exact literal application of Section 13(b)(1) of the Fair Labor Standards Act would result in the exemption or exclusion from the provisions of Section 7 every employee who might spend ten minutes a day in work substantially affecting safety and seven hours and fifty minutes in work having no effect whatever upon it.

The basis for the dissenting opinion in the *Levinson* case appears to be solely the contention that Congress could not have intended Section 13(b)(1) of the Fair Labor Standards Act to exclude from the benefits of overtime compensation all employees of motor carriers over whom the Interstate Commerce Commission had safety regulatory powers, despite the literal language of Section 13(b)(1). The minority in no way disagrees with the majority concerning the proposition that the Commission's safety jurisdiction should not be impaired in an attempt to extend broad coverage of the Fair Labor Standards Act. Apparently the only way perceived by the minority to preserve the Commission's safety jurisdiction and at the same time extend broad coverage of the Fair Labor Standards Act was to find the possible existence of con-

current jurisdiction of the Commission and the Administrator over certain *motor carrier employees*. The difficulty with the concurrent jurisdiction theory is its adoption would require not only a reversal of this Court's position in past decisions, but also would require complete disregard of the Congressional purpose as elsewhere expressed.

Acceptance of the concurrent jurisdiction theory would of necessity result in a reversal of this Court's position in the *Levinson* case. It would also require a reversal of this Court's position in *Southland Gasoline Co. v. Bayley, et al., 319 U. S. 44, 48, 49*, where this Court said:

> "By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime."
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> "Not only does the language of Section 13(b)(1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers."

In support of the latter observation this Court refers to statements made on the Senate floor to the effect that the amendment as to motor vehicle operators was intended to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service Acts. (81 Cong. Rec. 7875; 34 Stat. 1415, 39 Stat. 721.)

There is nothing in the record in this case which would indicate, and we can perceive no basis for any argument, that a motor carrier engaged in the transportation of property, a majority of whose freight moves in intrastate commerce, is any less engaged in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime, than a motor carrier of property transporting a majority of its freight in interstate commerce. It is also difficult to see upon what basis it could be contended that a carrier engaged principally in the transportation of property in interstate commerce should be subjected to regulation by a single federal agency and freed from regulation by two federal agencies, but that a carrier principally engaged in the transportation of property in intrastate commerce should, by virtue of that fact, be subjected to regulation by two federal agencies instead of one.

This Court's opinion in the *Southland Gasoline Company* case was expressly affirmed (page 858) in the *Levinson* opinion. In the *Levinson* decision, (page 852) this Court again concluded that:

> "Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in Section 7 of the Fair Labor Standards Act. Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to

the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act."

In support of the last cited statement, the Court makes reference to the failure of both Houses of Congress to adopt the amendment proposed by the Administrator in 1945 which would have amended Section 13(b)(1) to provide that exclusion from the provisions of Section 7 would apply only to an employee who during the greater part of any workweek was engaged in work with respect to which the Interstate Commerce Commission had established qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act. The Court also points to congressional amendments to the Motor Carrier Act in 1940 and in 1942, subsequent to the effective date of the Fair Labor Standards Act, as evidence of the congressional intent to prevent overlapping jurisdiction. (See footnote ten on page 851.) The 1940 amendment to the Motor Carrier Act excluded certain motor vehicle pickup and delivery service within terminal areas. The Administrator immediately asserted his jurisdiction over motor carrier employees so affected, but in the 1942 amendment Congress extended the exclusion of motor vehicle pickup and delivery service within terminal areas, but did subject such operations to the provisions of Section 204 relative to qualifications and maximum hours of service.

Apart from purely safety considerations, there is some strong evidence that Congress had economic factors in mind in extending regulation to motor carriers of property and those economic considerations have been recognized by this Court in the *Southland Gasoline Company* decision, in that portion cited above. There have been other decisions of this Court to similar effect.

In *United States v. American Trucking Associations, Inc., 310 U. S. 534, 541, 542,* a majority of this Court stated,

> "In the broad domain of social legislation few problems are enmeshed with the difficulties that surround a determination of what qualifications an employee should have and how long his hours of work may be. Upon the proper adjustment of these factors within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected as well as the employment and efficiency of the workers."

This Court's minority in the *American Trucking Association* case rested its dissent, without further comment, upon the opinion of the District Court of the United States for the District of Columbia which had been reversed by the majority decision. In the lower court decision, *31 F. Supp. 35, 38,* the District Court said:

> "The hearings before the Committee of Congress developed that the percentage cost of labor was equal to nearly half the total gross revenue of motor carriers, and the special attention of Congress was directed by representatives of the unions to the labor aspect as applied to the problems of uniformity and stabilization, because of widely diversified business organization, absence of labor organization in some regions, and the claimed unreasonable practices of many operators.
>
> And it is easy to see that stabilization of labor conditions as applied to this industry is an important, and indeed a necessary, part of the establishment of rates and general business regulation, matters as to which the Commission admittedly is expert, and these objectives appear as part and parcel of the purposes of the legislation. In this aspect, it is reasonable to conclude that Congress had them in mind when later, upon passage of the Fair Labor

> Standards Act, it provided specifically that Section 7 thereof—which establishes maximum hours of service—should not apply 'with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carrier Act, 1935, or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.'"

Justification for these expressions of judicial opinion that Congress also had economic factors in mind in its enactment of legislation extending the Commission's regulatory powers to motor carriers may be found in the purpose clause, originally found in Section 202(a) of the Motor Carrier Act and placed before Part I of the Interstate Commerce Act by the Transportation Act of 1940, subsequent to the enactment of the Fair Labor Standards Act of 1938. This clause now appears as Section 102 of the *Interstate Commerce Act, U. S. Code, Title 49, Chapter 1,* and purports to be a declaration of the National Transportation Policy of Congress.

Section 102 of the Interstate Commerce Act reads as follows:

> "It is hereby declared to be the national transportation policy of the congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive

competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Petitioner respectfully submits that extension of concurrent jurisdiction of the Interstate Commerce Commission and the Administrator of the Wage and Hour Division, United States Department of Labor, to the employees of Petitioner, and the exclusion of employees of competitive motor carriers from the jurisdiction of the Administrator, defeats the Congressional purpose as outlined in the National Transportation Policy and as interpreted by the decisions of this Court.

Under the Interstate Commerce Commission's safety regulations the average truck driver is permitted to work sixty hours in any consecutive period of one hundred sixty-eight hours. Under the provisions of Section 7 of the Fair Labor Standards Act any motor carrier driver deemed to be covered by the provisions of that Section is entitled to receive overtime compensation at time and one-half his regular rate of pay for all hours worked in excess of forty. Assuming concurrent jurisdiction of the Interstate Commerce Commission and the Administrator, this means that in any allowable period of sixty hours in a seven day workweek period a truck driver employee may be entitled to receive overtime compensation up to 20 hours, or one third of his total allowable hours.

The record in this case (R. 19, 28, 29) discloses that Petitioner's truck driver employees are compensated for their services pursuant to the terms of a union contract covering all union drivers engaged in general cartage operations within the Detroit Metropolitan Area, whether employed by companies engaged exclusively in a general cartage business in competition with a defendant, or employed to perform cartage operations in competition with Petitioner's operations by motor carriers engaged in line haul freight transportation in interstate commerce. Clearly the truck drivers of the line haul carriers are subject to the exclusive jurisdiction of the Commission and are excluded from the jurisdiction of the Administrator under the provisions of Section 13(b)(1) of the Fair Labor Standards Act. If the concurrent jurisdiction theory is adopted by this Court, both the truck driver employees of Petitioner and the truck driver employees of the line haul carriers may legally perform services up to sixty hours under Interstate Commerce Commission regulation. However, the Petitioner would then be exposed to liability for overtime compensation for all services performed by all truck drivers beyond forty hours and up to sixty hours in a given seven day period while the line haul carrier employers operating in competition with Petitioner would be exposed to no overtime compensation. Thus Petitioner is placed at a competitive disadvantage with such competitors and such competitor's employees are placed at an economic disadvantage in comparison with Petitioner's employees. This will tend to create the very basis for labor discontent and unfair competition which Congress allegedly sought to alleviate or to eliminate in its enactment of the Fair Labor Standards Act.

This court said in *Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 576.*

> "Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition, through undue extension of hours, by introducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime hours, but Congress may properly use it to lessen the irritation."

If Congress made provision for the payment of overtime compensation in the Fair Labor Standards Act as a means of lessening the irritation arising from labor discontent and unfair competition, it is difficult to see how this purpose can be accomplished if payment of overtime compensation is to be conditioned upon the volume, percentage or degree of interstate freight handled or interstate services performed as between truck driver employees physically engaged in what would appear to be identical transportation operations.

While legislative exemption and exclusion must, of necessity, involve classification, such classification should meet the tests of reasonableness and consistency with the legislative purpose. Application of the concurrent jurisdiction theory to any of Petitioner's employees on the mere basis of volume of interstate freight handled or frequency of interstate services performed, will produce an economic differentiation between employees of a single employer, the reasonableness of which will not be readily apparent to the affected employees or to their employer in view of the basic similarity of the services performed by such employees. The same reasoning is applicable to the extension of a similar differentiation between the employees of two or more carriers engaged in the performance of purely competitive services. Nor is it apparent

that Congress intended the exemption to afford relief to motor carriers on a differential basis, decreasing in effectiveness as the volume or percentage of purely intrastate activity increases.

Referring once again to the National Transportation Policy enunciated by Congress in Section 102 of the Interstate Commerce Act, it is difficult to observe how the application of the Section 13(b)(1) exemption on the basis of volume, percentage or frequency of interstate property transportation will result in "fair and impartial regulation of all modes of transportation"; will promote "economical and efficient service"; will "foster sound economic conditions in transportation and among the several carriers"; will "encourage the establishment and maintenance of reasonable charges for transportation"; will remove "unfair or destructive competitive practices"; or will "encourage fair wages and equitable working conditions."

Respectfully submitted,

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2280 Penobscot Building,
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Dated: Detroit, Michigan,
September 10, 1947.

APPENDIX

Fair Labor Standards Act, Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C.

"207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"213. Exemptions

(b) The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of sections 1-27 of Title 49."

"215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;"

"302. Application of provisions

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefore, is hereby vested in the Interstate Commerce Commission.

(c) Notwithstanding any provision of this section or of section 303, the provisions of this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) To transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrange-

ment) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental. Feb. 4, 1887, c. 104, Part II, Sec. 202, as added Aug. 9, 1935, c. 498, 49 Stat. 543 and amended Sept. 18, 1940, c. 722, Title I, Sec. 17, 54 Stat. 920; May 16, 1942, c. 318, Sec. 2, 56 Stat. 300."

"303. Definitions and exceptions.

(b) Vehicles excepted from operation of law. Nothing in this chapter, except the provisions of section 304 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone

adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit. Feb. 4, 1887, c. 104, Part II, Sec. 203, as added Aug. 9, 1935, c. 498, 49 Stat. 544 and amended June 23, 1938, c. 601, Sec. 1107 (j), 52 Stat. 1029; June 29, 1938, c. 811, Secs. 2, 3, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, Secs. 16, 18, 54 Stat. 919, 920."

"304. Powers and duties of commission

(a) Powers and duties generally. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Com-

mission may establish reasonable requirements, with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

"306. Certificate of convenience and necessity

(a) Necessity for; motor carriers in *bona fide* operation on June 1, 1935. Except as otherwise provided in this section and in section 310a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; * * * And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

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SEP. 23 1946

No. 326 7

In the Supreme Court of the United States

OCTOBER TERM, 1946

JAMES F. MORRIS, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutory provisions involved	2
Statement	2
Argument	4
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Bowie v. *Gonzalez*, 117 F. 2d 11	4
Calaf v. *Gonzalez*, 127 F. 2d 934	4
Griffin Cartage Co. v. *Walling*, 153 F. 2d 587	4
Levinson v. *Spector Motor Service*, No. 22, October Term, 1946	5
Ex parte No. MC–2, 28 M. C. C. 125	5
Mid-Continent Pipe Line Co. v. *Hargrave*, 129 F. 2d 655	4
Pyramid Motor Freight Corp. v. *Ispass*, No. 41, October Term, 1946	5
Rockton & Rion R. R. Co. v. *Walling*, 146 F. 2d 111, certiorari denied, 324 U. S. 880	4
Walling v. *Comet Carriers*, 151 F. 2d 107, certiorari denied in part, 326 U. S. 716	4, 5
Walling v. *Kreinbring*, 155 F. 2d 727	4
West Kentucky Coal Co. v. *Walling*, 153 F. 2d 582	4
Statutes:	
Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 U. S. C. 201):	
Sec. 3 (j)	4, 7
Sec. 13 (b) (1)	5, 7
Motor Carrier Act, 1935 (49 Stat. 543, as amended, 49 U. S. C. 303, 304):	
Sec. 203 (14)	7
Sec. 203 (15)	8
Sec. 204 (1)	8
Sec. 204 (2)	8

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 425

JAMES F. MORRIS, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The conclusions of law of the District Court (R. 39) are not officially reported. The opinion of the Circuit Court of Appeals (R. 48–54) is reported at 155 F. 2d 832.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 29, 1946 (R. 47). The petition for certiorari was filed on August 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether employees engaged in intrastate transportation between plants of unfinished steel and steel products used in the manufacture of automobiles, trucks, trailers, and machinery destined for interstate shipment are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

2. Whether employees who work only occasionally or only a few hours a week in interstate transportation are within the exemption provided by Section 13(b)(1) of the Act.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Petitioner operates a general cartage business in and about Detroit, Michigan (R. 11). Approximately 97 percent of his operations consists of the interplant transportation of unfinished steel in the course of its manufacture and the transportation of finished steel from the mills in Michigan where it is produced to the plants of automobile manufacturers in Detroit (R. 12–13). After further processing, the unfinished steel which petitioner transports is shipped in interstate commerce (R. 12). The finished steel transported consists principally of bumper stock, fender stock, and other types of steel commonly used in the manufacture of automo-

biles and parts (R. 14). This steel is used in the production of automobiles and subsequently moves in interstate commerce as part of the finished automobile (R. 14).

The remaining 3 percent of petitioner's business consists of miscellaneous local cartage of a pickup and delivery character, some of which involves the handling of goods in transit to or from points outside the State of Michigan (R. 13). A large majority of petitioner's drivers do not engage in such pickup and delivery transportation in the average workweek (R. 16). Truck drivers who do engage in such activities in any workweek also engage in interplant transportation as described above during much the greater portion of the time (R. 15–16).

Petitioner employs approximately 40 truck drivers, 14 mechanics and laborers, 3 dispatchers, and 3 office workers (R. 11). All except the office workers have been employed for hours in excess of the statutory straight-time maximum and none has received overtime in accordance with the requirements of the Act (R. 16–18).

The respondent brought suit to restrain petitioner from violating the Fair Labor Standards Act. The case was heard on stipulated facts, and the district court held that defendant was not engaged in the production of goods for commerce, and that the employees were also exempted from the Act by the provisions of Sections 13 (a) (1) and 13 (b) (1). (R. 39). The judgment was

reversed on both points by the circuit court of appeals (R. 48–54).

ARGUMENT

1. Petitioner urges that his employees are engaged in the "local" business of hauling freight within a single metropolitan area, and that although the goods are hauled for use in the manufacture of products to be shipped interstate, the employees are not engaged in the "production" of goods for commerce within the coverage of the Fair Labor Standards Act. Section 3 (j) defines "produced" as including "transporting," and it is well established by a consistent line of decisions in the circuit courts of appeal that intrastate transportation necessary to production for interstate commerce is covered by the Act. *Walling* v. *Comet Carriers,* 151 F. 2d 107 (C. C. A. 2), certiorari denied on this point, 326 U. S. 716; *Rockton & Rion R. R. Co.* v. *Walling,* 146 F. 2d 111 (C. C. A. 4), certiorari denied, 324 U. S. 880; *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655 (C. C. A. 10); *Griffin Cartage Co.* v. *Walling,* 153 F. 2d 587 (C. C. A. 6); *Walling* v. *Kreinbring,* 155 F. 2d 727 (C. C. A. 6); *West Kentucky Coal Co.* v. *Walling,* 153 F. 2d 582 (C. C. A. 6); *Bowie* v. *Gonzalez,* 117 F. 2d 11, 20 (C. C. A. 1); *Calaf* v. *Gonzalez,* 127 F. 2d 934, 936 (C. C. A. 1). Inasmuch as this Court specifically declined to review this precise question in the *Comet Carriers* case at the last term, it does not seem necessary to elaborate on this issue.

2. Section 13 (b) (1) of the Fair Labor Standards Act exempts from the overtime provisions of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." The second question presented is whether this exemption extends to truck drivers who spend a small proportion of their time driving in interstate commerce. This question is similar to that presented in *Levinson* v. *Spector Motor Service* and *Pyramid Motor Freight Corp.* v. *Ispass,* pending in this Court as Nos. 22 and 41, respectively, and virtually identical to that on which certiorari was granted in *Comet Carriers* v. *Walling,* 326 U. S. 716, subsequently dismissed on motion of the petitioner, May 6, 1946.

In the *Levinson* and *Ispass* cases the employees were engaged for a small part of their working hours in loading trucks which thereafter moved in interstate commerce.[1] In the instant case, as in the *Comet* case, the employees devote even a smaller proportion of their time to interstate driving.[2] Common to all the cases is the question whether the performance of any amount of ex-

[1] The Commission has asserted that loaders affect safety of operations so as to fall within its jurisdiction. *Ex parte No. MC-2,* 28 M. C. C. 125.

[2] In the great majority of weeks, as we have pointed out, the employees engage in no interstate driving (R. 16).

empt work in a workweek will render the exemption applicable for the entire workweek. The instant case is the only one of those presently before the Court to which the Administrator is a party. Inasmuch as the question is of importance in the administration of the Act and is closely related to those involved in cases now pending in this Court, we do not oppose the granting of the petition on this question.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied as to the first question and granted as to the second question presented.

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Solicitor General.

WILLIAM S. TYSON,
Solicitor,

MORTON LIFTIN,
Assistant Solicitor,

FREDERICK U. REEL,
Attorney,
United States Department of Labor.

SEPTEMBER 1946.

APPENDIX

PERTINENT STATUTORY PROVISIONS

Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 U. S. C. 201):

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.
>
> SEC. 13. * * * (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

Motor Carrier Act, 1935 (49 Stat. 543, as amended, 49 U. S. C. 303, 304):

> SEC. 203. (14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce

of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

SEC. 204. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1947

JAMES F. MORRIS, PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE ADMINISTRATOR

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	8
Argument:	
I. Petitioner's nondriving employees are not exempted from Section 7 by Section 13 (b) (1)	10
II. Petitioner's drivers are not exempted from Section 7 by Section 13 (b) (1)	16
A. Section 13 (b) (1) is not applicable where only a "very small proportion" of employees' activities is subject to regulation under the Motor Carrier Act	21
B. In any event, in those weeks in which petitioner's drivers do no "interstate" driving, Section 13 (b) (1) can have no application	41
Conclusion	43
Appendix A	44
Appendix B	47

CITATIONS

Cases:	
Anderson v. *Manhattan Lighterage Corp.*, 148 F. 2d 971, certiorari denied, 326 U. S. 722	31
Anuchick v. *Transamerican Freight Lines*, 46 F. Supp. 861	15, 40
Armstrong Co. v. *Walling*, 161 F. 2d 515	10
Bowie v. *Gonzalez*, 117 F. 2d 11	26
Calaf v. *Gonzalez*, 127 F. 2d 934	26
Colbeck v. *Dairyland Creamery Co.*, 17 N. W. 2d 262	40
Collins v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79	31
Connell v. *Delaware Aircraft Industries*, 7 W. H. Cases 182	27
Crean v. *Moran Transp. Lines*, 57 F. Supp. 212	39
Crude Talc from Calif. Mines to Dunn, Calif., 44 M. C. C. 714	19
Dallum v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785	19
Davis v. *Goodman Lumber Co.*, 133 F. 2d 52	31
Davis v. *Southern Calif. Freight Lines*, 8 Wage Hour Rept. 1151	40
Elmer C. Breuer, Inc., Extension—Ohio, M. C.-59358 (Sub. No. 2), 1 Fed. Carriers Cases par. 7483	19
Ex Parte No. MC-2, 3 M. C. C. 665, 6 M. C. C. 557, 11 M. C. C. 203	23

Cases—Continued

	Page
Ex Parte Nos. MC-2 and MC-3, 28 M. C. C. 125	8, 9, 12, 13, 14, 17, 19, 27, 41
Ex Parte No. MC-3, 23 M. C. C. 1	10, 24, 27, 41
Ex Parte No. MC-28, 13 M. C. C. 481	8, 12, 19, 41
Fleming v. *Swift & Co.*, 41 F. Supp. 825	31
Fletcher v. *Grinnell Bros.*, 150 F. 2d 337	11, 26, 39
Gordon's Transports v. *Walling*, 162 F. 2d 203	25
Griffin Cartage Co. v. *Walling*, 153 F. 2d 587	26, 39
Guess v. *Montague*, 140 F. 2d 500	31
Helena Glendale Ferry Co. v. *Walling*, 132 F. 2d 616	11
Helliwell v. *Haberman*, 140 F. 2d 833	10, 11
Holy Trinity Church v. *United States*, 143 U. S. 457	38
Hutchinson v. *Barry*, 50 F. Supp. 292	39, 42
Interstate Commerce Comm. v. *Columbus & G. Ry. Co.*, 153 F. 2d 194	19
Jackson v. *Northwest Airlines*, 70 F. Supp. 501	31
Keegan v. *Ruppert*, 6 Wage Hour Rept. 676	39
Keeling v. *Huber & Huber Motor Express*, 57 F. Supp. 617	15, 39
Levinson v. *Spector Motor Service*, 330 U. S. 649	8, 9, 12, 13, 16, 17, 19, 23, 30, 32, 39, 41
Mabee v. *White Plains Pub. Co.*, 327 U. S. 178	26
McDuffie v. *Hayes Freight Lines, Inc.*, 71 F. Supp. 755	15, 40
McKeown v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543	40
Missouri Pac. Ry. Co. v. *United States*, 211 Fed. 893	17
Musteen v. *Johnson*, 133 F. 2d 106	39
Nelson v. *Agwilines, Inc.*, 70 F. Supp. 497	31
Nelson v. *Allison & Co.*, 13 Labor Cases, par. 64,021	40
North Shore Corp. v. *Barnett*, 143 F. 2d 172	31
Overnight Motor Co. v. *Missel*, 316 U. S. 572	10, 42
Ozawa v. *United States*, 260 U. S. 178	21
Phillips, A. H., Inc. v. *Walling*, 324 U. S. 490	10, 30, 31, 40
Porter v. *Poindexter*, 6 W. H. Cases 586	38
Potashnick Local Truck System v. *Archer*, 207 Ark. 220, 179 S. W. 2d 696	40
Pyramid Motor Freight Corp. v. *Ispass*, 330 U. S. 695	8, 9, 12, 13, 16, 23, 30, 32, 41
Reynolds v. *Rogers Cartage Co.*, 71 F. Supp. 870	26, 42
Rockton & Rion Ry. Co. v. *Walling*, 54 F. Supp. 342, affirmed 146 F. 2d 111, certiorari denied, 324 U. S. 880	11, 25
Roland Electrical Co. v. *Black*, 7 W. H. Cases 167	42
Roland Electrical Co. v. *Walling*, 326 U. S. 657	25, 30
Shain v. *Armour & Co.*, 50 F. Supp. 907	31
Schulte Co. v. *Gangi*, 328 U. S. 108	15
Snyder v. *Wessner*, 55 F. Supp. 971	11
Southland Gasoline Co. v. *Bayley*, 319 U. S. 44	29
Stanger v. *Vocafilm Corp.*, 151 F. 2d 894	11
Sternberg Dredging Co. v. *Walling*, 158 F. 2d 678	42

Cases—Continued Page

Tennessee Coal Iron & R. R. Co. v. *Muscoda Local No. 123*, 321 U. S. 590 30
United States v. *American Trucking Assns.*, 310 U. S. 534 .. 8, 12, 19, 21, 38
United States v. *Florida East Coast Ry. Co.*, 222 Fed. 33 ... 17
Utah Junk Co. v. *Porter*, 328 U. S. 39 30
Vannoy v. *Swift & Co.*, 201 S. W. 2d 350 40
Wabash Radio Corp. v. *Walling*, 162 F. 2d 391 30
Walling v. *Bridgeman-Russell Co.*, 6 Wage Hour Rept. 132 .. 31
Walling v. *Burlington Transp. Co.*, 9 Labor Cases, Par. 62,576 15
Walling v. *Comet Carriers, Inc.*, 151 F. 2d 107 .. 19, 25, 26, 27, 39
Walling v. *Connecticut Co.*, 154 F. 2d 552 31
Walling v. *De Soto Creamery & Produce Co.*, 51 F. Supp. 938 ..... 19, 31
Walling v. *General Industries, Inc.*, 330 U. S. 545 10
Walling v. *Haden*, 153 F. 2d 196 31
Walling v. *Morris*, 155 F. 2d 832, certiorari denied, 330 U. S. 817 26
Walling v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 ..... 39, 42
Walling v. *Palmer*, 67 F. Supp. 12 39
Walling v. *Peacock Corp.*, 58 F. Supp. 880 32
Walling v. *Silver Fleet Motor Express*, 67 F. Supp. 846 .... 15, 42
Walling v. *Villaume Box & Lumber Co.*, 58 F. Supp. 150 .. 26
West Kentucky Coal Co. v. *Walling*, 153 F. 2d 582 26
Wood v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 31

Statutes:

Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq:*
Sec. 3 (i) 26
Sec. (j) 25, 26
Sec. 6 26
Sec. 7 ..... 21, 26
Sec. 13 (b) (1) 7, 8, 9, 21, 22, 25, 26, 41, 43
Hours of Service Act, Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. 61 17
Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. 302, 303, 304:
Sec. 202 (a) 19, 41, 43
Sec. 202 (b) 19, 41, 43
Sec. 203 (a) (14) 19, 41, 44
Sec. 203 (a) (15) 19, 44
Sec. 203 (a) (16) 19, 44
Sec. 203 (a) (17) 19, 44
Sec. 204 (a) (1) 45
Sec. 204 (a) (2) 45
Sec. 204 (a) (3) 45
National Transportation Policy, 54 Stat. 899 40

Miscellaneous:

	Page
81 Cong. Rec. 7875	27, 28, 46
Hours of Service Regulations (49 C. F. R. Cum. Supp. Part 191)	22
Sec. 191.1 (a)–(e)	24
Sec. 191.3	23
Interstate Commerce Commission, Bureau of Motor Carriers, Ruling No. 79, May 16, 1939	24

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

OPINIONS BELOW

The district court wrote no opinion. The conclusions of law of the district court (R. 39) are not reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 48–50), reversing the judgment of the district court, is reported at 155 F. 2d 832.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 29, 1946 (R. 47). The petition for a writ of certiorari was filed on August

21, 1946, and was granted on April 7, 1947, limited to the second question presented in the petition (R. 55). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether employees of a motor carrier, all of whose transportation activities are performed wholly within the Detroit metropolitan area in the State of Michigan, and "a very small proportion" of whose activities constitutes interstate commerce, are exempted from the overtime provisions of the Fair Labor Standards Act under Section 13 (b) (1) of that Act.

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act and of the Motor Carrier Act are set forth in Appendix A, *infra*, pp. 43–45.

STATEMENT

Petitioner, a motor carrier, is the sole owner and operator of a general cartage business in Ecorse, Michigan (R. 48). His principal business consists of the transportation, entirely in the State of Michigan in the metropolitan area of Detroit, of steel used in the manufacture of automobiles and parts (R. 11, 14). Petitioner employs approximately 60 persons including 40 truck drivers, 14 mechanics, painters, washers and repairmen, a superintendent of maintenance, and 3 dispatchers (R. 48, 49). The truck drivers

engage in hauling of the types hereafter described. The character of the work of the mechanics, painters, washers and repairmen does not appear in the record except as revealed by their descriptive titles. The dispatchers, who are paid at hourly rates, have supervisory authority over the drivers (R. 17). The superintendent of maintenance, who is paid a straight weekly wage, has supervisory authority over the mechanics and laborers, works the same schedule of hours as they do, and spends approximately 25 per cent of his time in performing the routine tasks of a mechanic and laborer. All of these employees worked in excess of the statutory maximum without receiving overtime compensation in accordance with Section 7 of the Fair Labor Standards Act (R. 16, 17).

Between August 1, 1940 and August 1, 1941, petitioner's truck drivers were employed pursuant to the terms of a collective bargaining agreement which provided for overtime compensation for weekly hours in excess of 52; since August 1, 1941, the collective bargaining agreement has provided for overtime compensation with respect to hours worked in excess of 54. These collective bargaining agreements are general agreements covering all union drivers engaged in general cartage operations within the area, apparently without regard to whether the employer is a motor carrier subject to the provisions of Section 204 (a) of the Motor Carrier Act (R. 18, 19).

The agreement, which is set out in full in the record (R. 28–38), provides (par. 8, R. 32) among other things, that any of its provisions subsequently determined to be in violation of the Fair Labor Standards Act or applicable state law "are to be changed so that there is no violation of the statutes, provided, however, that such changes shall not result in any substantial penalties to members of the Union or the company."

Approximately 3 per cent of petitioner's business consists of trips between steel plants and interstate terminals in Detroit (R. 12, 13). Approximately 60 per cent of the cartage services involves the transportation of steel from the mills of the Great Lakes Steel Corporation and the Michigan Steel Corporation at Ecorse, Michigan, to manufacturers in the Detroit metropolitan area (R. 12). Approximately 35 per cent of petitioner's operations consists of the transportation of unfinished steel within the plants of the two above-mentioned mills or interplant hauling between the two mills (R. 12). In these operations, petitioner's trucks often operate within the plant and without leaving the plant for several days (R. 12). Ninety-nine per cent of petitioner's operations is performed for the Great Lakes Steel Corporation and the Michigan Steel Corporation, located in Ecorse, Michigan, both subsidiaries of the National Steel Corporation (R. 12, 13). Only one per cent of petitioner's business is performed for shippers other than

these two mills (R. 13). Petitioner's drivers never drive outside the Detroit metropolitan area in the State of Michigan (R. 11).

The small percentage of trips (3.65%) in which petitioner's drivers haul goods moving in interstate commerce are made to or from boat docks, railroad depots, freight terminals and truck terminals in the Detroit metropolitan area, wholly within the State of Michigan, at which points the drivers pick up or deliver interstate freight shipments (R. 15).[1] Of a total of 19,786 truck trips of all types made during 1941, 2.34 per cent, or 464, were "interstate" trips made to railroad or motor carrier depots, and 1.31 per cent, or 260, were "interstate" trips made to the boat docks of steamship companies (R. 13, 15).

During 1941 (the calendar year immediately preceding the filing of the complaint), 43 drivers worked a total of 1903 weeks. Of this total, 1438 or 75.6 per cent of the weeks worked were devoted exclusively to intrastate transportation activities (R. 24–27). In only 465 or 24.4 per cent of the weeks did one or more trips involving interstate shipments occur (R. 24–27). Thus, local interplant hauling was performed exclusively by the "average" driver in 75.6 per cent of the weeks worked (R. 16, 27, 49). Two employees were exclusively engaged in interplant hauling during the full period of their employment during 1941

[1] Trips of this type, for convenience, are referred to herein as "interstate" trips.

(R. 16, 26, 27, 49), and, with the exception of two other employees, all of petitioner's drivers were exclusively engaged in interplant hauling during the greater part (50 per cent or more) of the weeks worked in the year (R. 16, 26, 27). Twenty-six of petitioner's 43 drivers, or 60 per cent, spent all their time in interplant hauling during 75 to 100 per cent of the weeks worked in the year (R. 26, 27). The two drivers who made "interstate" trips in a majority of the weeks (51) in which they worked during the year drove in intrastate trips exclusively for 24 and 22 weeks, respectively (W. Chase and L. Ruby, R. 26, 27). No individual driver appears to have made "interstate" trips regularly from week to week; rather, such trips are shown to have occurred on sporadic occasions throughout the year. Typically, one or two trips of this character would be made in a particular week, or consecutive weeks, followed by one or more, and often many, weeks in which no such trips were made (Exhibit "C" referred to at R. 15).[2] Of a total of 1903 weeks worked by individual drivers in the year (R. 27), in which a total of 19,786 trips were made (R. 15), there were 319 in which the driver made only a single trip to a boat dock or freight terminal, and 85 weeks in which he made two such trips. In only 61 of the 1903 weeks did a driver make more than two "interstate" trips (Exhibit "C").

[2] Exhibit C is not printed in the record but a copy has been lodged with the Clerk of this Court.

In this suit to enjoin the petitioner from violating the Fair Labor Standards Act (R. 2–5), the district court held that petitioner and his employees were not engaged in the production of goods for commerce and that in any event, to the extent that they might be considered engaged "in commerce", the dispatchers and superintendent of maintenance were exempt under Section 13 (a) (1) as employees employed in a bona fide executive or administrative capacity, and the truck drivers and the garage employees were exempt under Section 13 (b) (1) of the Act (R. 39). (See Appendix A, *infra*, p. 43.) The judgment was reversed on all points by the circuit court of appeals (R. 47–54), which held that petitioner had failed to meet the burden of bringing himself within either exemption. The appellate court held, with respect to Section 13 (b) (1), that the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, and the corresponding exemption, extends to truck drivers whose work affects safety of operation and to mechanics who actually perform inspection and repair work on trucks, but that it does not extend to such garage employees as painters, washers and dispatchers (R. 52). It also held that a truck driver engaged in driving trucks both in interstate and intrastate commerce "must devote a substantial part of his time to the driving of trucks in interstate commerce in order to come within the exemption provision," but that it was

unnecessary to determine what constitutes "a substantial part" of the time of an employee because the facts failed to show more than "a very small proportion of time devoted to interstate transportation." (R. 52–53.)

SUMMARY OF ARGUMENT

I

Petitioner has not shown that any of his nondriving employees are employees of the kind described in Section 13 (b) (1). This exemption from Section 7 of the Act applies only to those employees whose activities directly affect the safety of operation of motor vehicles in interstate transportation. *United States* v. *American Trucking Assns.*, 310 U. S. 534; *Levinson* v. *Spector Motor Service*, 330 U. S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695; *Ex Parte No. MC–28*, 13 M. C. C. 481; *Ex Parte Nos. MC–2 and MC–3*, 28 MCC 125. The Interstate Commerce Commission has defined and limited the classes of employees whose activities directly affect such safety of operation. *Ex Parte Nos. MC–2* and *MC–3, supra;* see also *Ispass* and *Levinson* cases, *supra.* There is no evidence that any of petitioner's nondriving employees is actually engaged in any activities affecting safety of operation of motor vehicles used for transportation in interstate or foreign commerce. And the record in this case is devoid of evidence that any of the activities engaged in by the dispatchers, painters, washers, mechanics, repairmen, or by the super-

intendent of maintenance are of a kind performed by "drivers," "loaders," "drivers' helpers," or "mechanics" as the Commission has defined them. Since the Commission has expressly found that no other classes of employees directly affect "safety of operation," there is no basis for holding Section 13 (b) (1) applicable to these employees of petitioner. *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 708; *Ex Parte Nos. MC–2* and *MC–3, supra.*

II

A. *Petitioner's drivers are not within the exemption provided by Section 13 (b) (1).* The circuit court of appeals correctly held that driving in interstate commerce must constitute a substantial part of an employee's activities before the exemption will apply, and that the "very small proportion" of such driving performed incidentally on sporadic occasions by petitioner's drivers did not meet this test.

The rule applied by the circuit court of appeals best accomplishes the purposes of both the Motor Carrier Act and the Fair Labor Standards Act. It is not inconsistent with anything decided by this Court in *Levinson* v. *Spector Motor Service,* 330 U. S. 649, the question here involved having been expressly left open in *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695. The ruling of the court below does not conflict with the safety program of the Interstate Commerce Commission, and it gives practical effect, in a peripheral area of application of the Motor Car-

rier Act, to the underlying policy of Congress that the long hours of truck drivers should be regulated. Undesirable consequences, inconsistent with accepted purposes of the statute, would follow adoption of the construction for which petitioner contends. Avoidance of such a construction by affirmance of the decision below would best carry out the legislative intent.

B. *The exemption does not apply in any event to petitioner's drivers in those workweeks when they do no "interstate" driving.* The workweek principle for measuring overtime obligations under the Act requires that petitioner's drivers be held subject to the provisions of Section 7 in the large majority of their workweeks in which no driving subject to the authority of the Interstate Commerce Commission was done. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Ex Parte No. MC–3,* 23 M. C. C. 1, 39.

ARGUMENT

I

PETITIONER'S NONDRIVING EMPLOYEES ARE NOT EXEMPTED FROM SECTION 7 BY SECTION 13 (B) (1)

Petitioner has not sustained the burden[3] of showing that any of his garage employees or dispatchers are excluded from the overtime benefits

[3] The courts have consistently held that the burden rests on the employer to show that an exemption from the Act is applicable. *Walling* v. *General Industries, Inc.,* 330 U. S. 545, 547–548; *A. H. Phillips, Inc.* v. *Walling,* 324 U. S. 490; *Armstrong Co.* v. *Walling,* 161 F. 2d 515 (C. C. A. 1); *Helli-*

of the Act by virtue of the exemption provided in Section 13 (b) (1). The record shows only that petitioner employed approximately 14 persons "as mechanics, painters, washers and repairmen in the garage", and three persons "as dispatchers" during the calendar year immediately preceding the filing of the Administrator's complaint (R. 11), and that these employees were paid at hourly rates without extra compensation for overtime (R. 16, 17). The duties of these persons are not otherwise described. It further appears that petitioner employs a superintendent of maintenance, "who works the same schedule of hours as the other mechanics and laborers, [and] devotes approximately twenty-five (25) per cent of his time to the performance of routine physical tasks of the same general character as that of the employees working under his direction and supervision." (R. 17.)

These facts clearly do not establish that any of petitioner's garage employees or dispatchers, or his superintendent of maintenance, engages in any activities directly affecting safety of operation of motor vehicles in transportation in interstate or foreign commerce. Unless they are so

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well v. *Haberman*, 140 F. 2d 833 (C. C. A. 2); *Stanger* v. *Vocafilm Corp.*, 151 F. 2d 894 (C. C. A. 2); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8); *Rockton & Rion Ry. Co.* v. *Walling*, 54 F. Supp. 342 (W. D. S. C.), affirmed 146 F. 2d 111 (C. C. A. 4), certiorari denied, 324 U. S. 880; *Snyder* v. *Wessner*, 55 F. Supp. 971 (D. Minn.).

engaged, the Interstate Commerce Commission is without power to establish qualifications and maximum hours of service with respect to them, and they are, accordingly, not exempted from the overtime provisions of the Act under the terms of Section 13 (b) (1). *United States* v. *American Trucking Associations,* 310 U. S. 534; *Levinson* v. *Spector Motor Service,* 330 U. S. 649; *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695; *Ex Parte No. MC–28,* May 9, 1939, 13 M. C. C. 481; *Ex Parte Nos. MC–2 and MC–3,* March 4, 1941, 28 M. C. C. 125.

In *Ex Parte Nos. MC–2 and MC–3, supra,* the Interstate Commerce Commission found as a fact that mechanics, loaders, and drivers' helpers employed by carriers subject to Part II of the Interstate Commerce Act, who performed duties described by the Commission, devote a "large" or "substantial" part of their time to activities directly affecting safety of operation of motor vehicles in transportation in interstate commerce. At the same time, the Commission found as a fact that no other employees of such carriers, except drivers, perform duties which directly affect safety of operation. *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 138, 139. In the same proceeding, the Commission expressly found that employees performing the normal duties of dispatchers, as described by it, "engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." It made similar findings with respect to "em-

ployees who do nothing but oil, gas, grease or wash the motor vehicles," "men who do nothing but paint vehicles," and "carpenters" and "tarpaulin tailors." *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 133–135. These findings of fact are, of course, "squarely within the jurisdiction of the Commission." *Levinson* v. *Spector Motor Service, supra,* at page 669. As this Court has said, "The special knowledge and experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process." *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. at 707. If petitioner's painters and washers did any work other than painting or washing vehicles (activities which the Commission has found not to affect safety of operation), it may be assumed that evidence of such work would have been presented.[4] In the absence of such evidence, there is clearly no basis for holding the exemption applicable to the "painters" and "washers." The same is true with respect to the dispatchers. See *Ispass* opinion at p. 708.

The record is devoid of evidence as to the duties of petitioner's "mechanics" and "repair-

[4] The stipulation of facts on which the case was heard provided for the introduction by either party at the hearing of relevant and material evidence of other facts not inconsistent with those stipulated (R. 11).

men." It does not appear to what extent, if any, these employees engage in activities of the kinds performed by the "mechanics" whom the Commission found to be engaged in work directly affecting "safety of operation." There is nothing in the record to indicate that any of these employees actually performs any duties in any particular week with respect to any vehicle used by petitioner in transportation in interstate or foreign commerce. It follows that they cannot be deemed exempt as engaged in work directly affecting safety of operation under the Commission's view that "the term 'safety of operation', as used in section 204 (a) of part II of the Interstate Commerce Act, means the safety of operation of motor vehicles *in the transportation* of passengers or property *in interstate or foreign commerce,* and that alone." (Emphasis supplied.) *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 139 (Conclusions of Law No. 1). This conclusion is reinforced by the fact that it does not appear to what extent, if any, petitioner's mechanics and repairmen performed work, such as keeping the lights and brakes of such vehicles in good condition, which the Commission has found to be work directly affecting safety of operation. All or some of them may have been engaged in work of another character. The district courts, as shown in the footnote, have held that various types of mechanical or repair work

do not directly affect safety of operation.[5] Without attempting to suggest whether these decisions correctly evaluate the safety character of the work performed, it is reasonably clear that many types of repair activities may not directly affect safety of operation. Since the burden of establishing an exemption is on the employer (see note 3, pp. 10–11, *supra*), we submit that the silence of the record with respect to the duties of the mechanics and repairmen requires the denial of the exemption. This conclusion is fortified in the instant case by the fact that only three per cent of petitioner's activities are in interstate commerce. This being true, it cannot reasonably be assumed without specific proof that the work of any mechanic in any particular workweek related to trucks which were actually employed in making interstate trips. Cf. *Schulte Co.* v. *Gangi*, 328 U. S. 108, 118. Moreover, even if it

[5] In *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W. D. Ky.), it was held that the repair work must be performed on the motor vehicle and that the repair of parts and batteries removed from trucks to be put in stock for future use was not safety work. Vulcanizing and patching tubes and remounting tires on rims were also considered non-safety work. Similarly, the rebuilding and reconditioning of automobile, bus, and tractor bodies has been held not to affect safety. *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861 (E. D. Mich.); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (W. D. Ky.); *Walling* v. *Burlington Transp. Co.* (D. Neb.), 9 Labor Cases, par. 62,576. Other types of work performed by repairmen which do not affect safety are also described in *McDuffie* v. *Hayes Freight Lines, Inc.*, 71 F. Supp. 755 (E. D. Ill.).

were arbitrarily assumed that each mechanic in each workweek spent three per cent of his time working on trucks which were used in interstate commerce and that this work affected safety of operation, we believe, for the reasons developed hereafter, that this would not constitute a sufficiently substantial part of his work to warrant application of the exemption.

II

PETITIONER'S DRIVERS ARE NOT EXEMPTED FROM SECTION 7 BY SECTION 13 (b) (1)

This case involves the question as to which this Court reserved decision in *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 708 (cf. *Levinson* v. *Spector Motor Service,* 330 U. S. 649): Is there an exemption under Section 13 (b) (1) of the Fair Labor Standards Act, based on the power of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act to prescribe qualifications and maximum hours of service for employees of motor carriers whose activities include some which affect safety of operation of motor vehicles in transportation in interstate or foreign commerce, where such safety activities constitute less than a substantial part of the activities in which the employee is engaged? It is the Administrator's position that the court below properly held the "very small proportion of time devoted to interstate transportation" by petitioner's drivers to be insufficient, on the facts

disclosed by the record, to bring these drivers within the scope of the exemption provided by Section 13 (b) (1).

Prior to this Court's consideration of the *Levinson* case, the Interstate Commerce Commission, after careful consideration of the extent of its power under Section 204, concluded that it "is limited to those employees [of common, contract, and private carriers] who devote a *substantial part of their time* to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce." *Ex Parte Nos. MC–2 and MC–3, supra* (Conclusions of Law No. 2, 28 M. C. C. 125, 139). [Italics supplied.][*] In its brief in the *Levinson* case, however, the Commission argued that if an employee of a motor carrier is engaged in operations relating to safety

[*] In reaching this conclusion, the Commission referred to and followed decisions interpreting the scope of the Hours of Service Act (Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. 61), which is also administered by the Interstate Commerce Commission. That Act restricts employees actually engaged in or connected with the movement of trains from working more than 16 consecutive hours, subject to the proviso that "an operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches trains" shall not be on duty more than 9 hours in any period of 24 hours. Under this Act, the argument that the proviso applied to employees such as conductors and switchmen who used the telephone only occasionally to transmit orders to engineers has been rejected. *United States* v. *Florida East Coast Ry. Co.*, 222 Fed. 33 (C. C. A. 5); *Missouri Pac. Ry. Co.* v. *United States*, 211 Fed. 893 (C. C. A. 8).

for any time at all, it has some power over him. The Solicitor General did not take issue with this claim, but did question the suggestion that this automatically determined the application of the exemption from the Fair Labor Standards Act. He pointed out that to allow the exemption to reach employees who work an insubstantial portion of their time in work subject to the Commission's power would open an easy avenue of evasion. Inasmuch as it was found in the *Levinson* case that a substantial part of the employee's work was subject to the Commission's power, the Court was not immediately confronted with the problem raised by the Solicitor General. The facts in this case, however, present this problem directly.

The record is clear that the only driving performed by petitioner's employees which might possibly be subject to the regulatory power of the Interstate Commerce Commission under Section 204 (a) of the Motor Carrier Act is the "very small proportion" referred to by the circuit court of appeals (R. 53).[7] Such driving, performed wholly in Michigan within the Detroit Metropolitan area (R. 13), accounts for less than

[7] Almost all (between 96 and 97 per cent) of petitioner's operations and of his employees' activities (R. 12, 15) are confined to the transportation of goods moving *intra*state within the Detroit metropolitan area (R. 11–13) as a part of the production of such goods for commerce (R. 51). The Interstate Commerce Commission does not have regulatory power with respect to such transportation under the Motor

4 per cent of the trips made by petitioner's drivers in the course of a year's work (R. 15). It consists of trips to boat docks or freight terminals to pick up or deliver freight moving interstate between points outside Michigan and points in that State within the Detroit area (R. 13). The great majority of these trips are made to or from the plants of the two steel corporations with whom petitioner does virtually all of his business (R. 13), and appear to constitute an incidental and relatively inconsequential part of his general hauling business. In fact, approximately 99 per cent of petitioner's transportation activities are performed for the Great Lakes Steel Corporation and the Michigan Steel Cor-

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Carrier Act. Sections 202 (a), (b), 203 (a) (14), (15), (16), (17). See also *Crude Talc from California Mines to Dunn, Cal.*, 44 M. C. C. 714; *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Dallum* v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785 (D. Minn.). Cf. *Interstate Commerce Commission* v. *Columbus & G. Ry. Co.*, 153 F. 2d 194 (C. C. A. 5). Petitioner, when engaged in such transportation, does not act as a "motor carrier" subject to the provisions of the Motor Carrier Act. *Elmer C. Breuer, Inc., Extension—Ohio, No. MC-59358 (Sub. No. 2)*, March 25, 1940, 1 Fed. Carriers Cases par. 7483. His employees, when so engaged, do not perform activities affecting "safety of operation" within the meaning of Section 204 (a), under the Commission's definition of that term. *Ex Parte Nos. MC-2 and MC-3*, March 4, 1941, 28 M. C. C. 125, 139 (Conclusions of Law, No. 1); see also *Ex Parte No. MC-28*, May 9, 1939, 13 M. C. C. 481, 482, 488; *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 685; *United States* v. *American Trucking Assns.*, 310 U. S. 534.

poration in connection with their steel manufacturing business (R. 12–13) in Ecorse, Michigan, adjacent to Detroit (R. 11). Petitioner's activities are integrated with those of the two companies (subsidiaries of the National Steel Corporation) in the production of steel and steel products which ultimately move in interstate commerce. Petitioner's trucks often operate within a single plant without leaving the plant for several days. (R. 12.)

It does not appear that any of petitioner's drivers are regularly assigned to, or regularly make, these "interstate" trips. Some make none at all; the others make them only occasionally and sporadically (R. 15, 16, 24–27; Exhibit "C", see *supra*, note 2, p. 6). As petitioner admits in his brief, the record discloses "a total lack of uniformity in the allocation [of these trips] among the various employees * * *". (Pet. Br. 48), and there is "compelling evidence that the handling of freight in interstate commerce is based upon happenstance" (Pet. Br. 27). The infrequency of these "interstate" trips is emphasized by the fact that the "average" driver makes none of them in more than three-fourths of the weeks worked within a period of a year (R. 16, 27, 49).

If the qualifications and hours of service of petitioner's drivers are not subject to regulation under the Motor Carrier Act, it is clear that petitioner's drivers do not come within the terms

of the exemption from Section 7 which Section 13 (b) (1) provides. The Administrator's argument here, however, is not rested on this ground. It is his position that even if, under Section 204 of the Motor Carrier Act, petitioner's drivers are subject to the Commission's power with respect to the small amounts of "interstate" driving they do on sporadic occasions, it does not follow that they are employees of the kind to which Section 13 (b) (1) refers and who are exempted by that Section from the provisions of Section 7. To hold the exemption applicable to these employees, virtually all of whose activities are not subject to the Commission's power, would require a reading of Section 13 (b) (1) which would seem "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations*, 310 U. S. 534, 543; *Ozawa* v. *United States*, 260 U. S. 178, 194. The national policy as derived from both the Motor Carrier Act and the Fair Labor Standards Act, when applied to the circumstances of this case, would seem to require that both statutes be permitted to operate in their respective spheres.

A. *Section 13 (b) (1) is not applicable where only a "very small proportion" of employees' activities is subject to regulation under the Motor Carrier Act.*—If this Court should conclude that petitioner's drivers, when they engage in small amounts of interstate activities on sporadic occasions, come within the power of the Commis-

sion under Section 204 of the Motor Carrier Act, we do not believe this would be an adequate basis for the further conclusion that petitioner's drivers are exempted by Section 13 (b) (1) from the overtime benefits of the Fair Labor Standards Act. It is the Administrator's position that the "substantial part" rule followed by the court below ought to be applied here because it best accords with the terms and purposes of both statutes and gives practical effect, in a peripheral area of application of the Motor Carrier Act, to the underlying policy of Congress that the long hours of truck drivers should be regulated.

The extremely limited scope within which the Commission's power can conceivably operate where less than a substantial part of an employee's activities affect safety of operation in interstate commerce suggests that the reasons for the exemption accorded by Section 13 (b) (1) of the Fair Labor Standards Act do not exist in such a case. If the Commission's regulatory power extends to petitioner's drivers,* it does so only with respect to the "very small proportion" of their activities represented by their occasional

*The Commission's hours-of-service regulations (49 C. F. R. Cum. Supp. Part 191) define a "driver" (sec. 191.1 (b)) as "any individual who drives in transportation *in interstate or foreign commerce* any motor vehicle * * *" (italics supplied). Petitioner's drivers do not fall within this definition except in the occasional and sporadic instances when they make a trip to a boat dock or a freight terminal.

trips to freight terminals or boat docks.* This is necessarily true because, as shown earlier herein, the Commission's power under Section 204 (a) of the Motor Carrier Act is confined to regulation of transportation in interstate and foreign commerce, and is limited to activities of employees affecting the safety of operation of motor vehicles engaged in such transportation. The Act does not confer upon the Commission power to regulate any other kind of work. It is true, as this Court recognized in the *Levinson* case (330 U. S. at 675, 679), that the Commission can establish "maximum hours of service" under which an employee will not be permitted to engage in any "safety" activities after spending a certain number of hours on duty in *any* kind of work (safety, nonsafety, interstate or intrastate). The Commission, as this Court noted, has done so with respect to drivers. 49 C. F. R. Cum. Supp. Part 191, sec. 191.3. See also *Ex Parte No. MC-2*, 3 M. C. C. 665, 6 M. C. C. 557, 11 M. C. C. 203; *Ex Parte No. MC-3*, 23 M. C. C. 1. But this

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* This court recognized in *Pyramid Motor Freight Corp.* v. *Ispass*, *supra*, (at p. 708), that "even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities * * * that his activities will not come within the kind of 'loading' which is described by the Commission and which, in its opinion, affects safety of operation." To the extent that the facts may justify the application of a similar principle to the activities of any of petitioner's drivers, such drivers would clearly not be engaged in activities which provide a basis for exemption under section 18 (b) (1).

power to limit engagement in interstate transportation activities to employees who have not worked too long at any kind of task is by no means equivalent to a "power to establish * * * maximum hours" for noninterstate and other nonsafety work. As the Commission has recognized, the hours spent in such work are not subject to its regulatory power. Thus, the Commission has ruled that a driver who does no interstate driving in a given week is not subject to regulation by it of his daily or weekly maximum hours in that week. *Ex Parte No. MC–3*, 23 M. C. C. 1, 39. See 49 C. F. R. Part 191, Secs. 191.1 (a)–(e), 191.3. Similarly, an employee who does interstate driving early in the week and spends the latter part of the week in intrastate driving or other nonsafety work is not subject to any limitation on the number of hours he may devote to such work.[10] It follows that petitioner's drivers, in those periods when they are not engaged in hauling interstate shipments or in

[10] Interstate Commerce Commission, Bureau of Motor Carriers, Ruling No. 79, May 16, 1939. The ruling used the illustration of an "extreme case" in which 60 hours had been spent on duty in interstate work in the first five days of the week, and 24 more hours were spent in intrastate work thereafter. The ruling also pointed out that if any of these hours should fall within the 168-hour period immediately preceding the driver's return to driving or other safety work in interstate commerce, they would, of course, be *counted* with other hours of duty to determine whether performance of the interstate work would result in exceeding the maximum weekly limit applicable to interstate work.

other work affecting safety of operation in interstate commerce, are not in any real sense "employee[s] with respect to whom the Interstate Commerce Commission has" the "power" referred to in Section 13 (b) (1).

It would seem to require an unnecessarily literal reading of Section 13 (b) (1) to construe it to mean that, for purposes of the Fair Labor Standards Act, a person is, in the light of his activities as a whole, an "employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act" where so insubstantial and sporadic a part of his activities has any relation to the sphere of the Interstate Commerce Commission. Clearly, as to approximately 97 per cent of his activities he is not such an employee. The purpose of the Fair Labor Standards Act to have the overtime provisions of the Act apply to transportation activities which constitute an integral part of production is clear from Section 3 (j) which specifically defines "production" as including "transporting." Cf. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657. Petitioner's drivers spend virtually all of their time in transportation activities which fall within the Act's specific definition of coverage.[11] A

[11] *Rockton & Rion Ry. Co.* v. *Walling*, 146 F. 2d 111 (C. C. A. 4); *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107 (C. C. A. 2); *Gordon's Transports* v. *Walling*, 162 F.

clearer instance of work to which both the minimum wage and overtime provisions (Sections 6, 7, 3 (i), 3 (j)) of the Act were intended to apply would be difficult to find. And the intrastate activities of petitioner's drivers clearly are not exempt work under Section 13 (b) (1).[12]

If it is proper to assume that Congress did not intend to *bring within* the provisions of the Fair Labor Standards Act those engaged in "sporadic or occasional shipments of insubstantial amounts of goods," even by using the term, "any goods," (*Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181), it would seem equally proper to assume that Congress did not intend to *remove* clearly covered employees from its provisions because of their engagement sporadically or occasionally in an insubstantial amount of activities affecting "safety of operation." Neither the language of Section 13 (b) (1) nor its legislative history suggests the result that an employee who, under the Motor Carrier Act, is subject to the Commission's regu-

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2d 203 (C. C. A. 6); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. C. A. 6); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Walling* v. *Morris*, 155 F. 2d 832 (C. C. A. 6), certiorari denied as to this point, 330 U. S. 817; *Bowie* v. *Gonzalez*, 117 F. 2d 11, 20 (C. C. A. 1); *Calaf* v. *Gonzalez*, 127 F. 2d 934, 936 (C. C. A. 1).

[12] See *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. C. A. 6); *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 167 (C. C. A. 2); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Reynolds* v. *Rogers Cartage Co.*, 71 F. Supp. 870 (W. D. Ky.); *Walling* v *Villaume Box & Lumber Co.*, 58 F. Supp. 150 (D. Minn.).

latory power as to only 3 per cent of his activities and not subject as to 97 per cent of his activities is to be considered, for purposes of the Fair Labor Standards Act, as subject to the Commission's power for all periods of his activity.[13]

Nothing in the legislative history suggests that Congress intended the hours of drivers to be removed from the coverage of the Fair Labor Standards Act because of occasional small amounts of interstate driving, with respect to which effective regulation of hours by the Commission would be difficult or impossible. On the contrary, the necessity of effective regulation was stressed. The purpose of Section 13 (b) (1) was explained on the floor of the Senate by Senator Black when it was proposed as an amendment to the pending bill. He stated (81 Cong. Rec. 7875):[14]

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[13] Petitioner relies on the Commission's ruling in *Ex Parte No. MC–3*, 23 M. C. C. 1, 39, to the effect that a driver who is engaged in driving in interstate commerce "on any day of a given week" is subject to the Commission's regulations as to weekly maximum hours. The courts and apparently the Commission, however, have not interpreted this ruling as does petitioner, and have not regarded it as intended to apply to small amounts of driving comparable to that performed in the instant case. *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2); *Connell* v. *Delaware Aircraft Industries* (Del. Super. Ct., July 15, 1947), 7 Wage Hour Cases 182; *Ex Parte Nos. MC–2* and *MC–3*, 28 M. C. C. 125, 139—Conclusions of Law No. 2.

[14] A complete reprint of the discussion on the floor of the Senate appears in Appendix B, *infra*, pp. 46–51.

> * * * it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. * * *
>
> The amendment of the Senator from New Jersey [MR. MOORE] would apply the same principle to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.
>
> * * * * * *
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> * * * The committee were of the opinion, when we originally took up the bill for consideration, that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. That had not been done by any other governmental agency at the time of the hearings. Consequently the amendment was not adopted by the committee.

This explanation of the purpose of the exemption evidences a Congressional intent to provide an exemption which would avoid regulation of the hours of drivers under the Fair Labor Standards Act if they were subject to regulation by the Interstate Commerce Commission. The legislative discussion leaves room for the theory that the exemption was proposed because it was thought that the hours of work of truck drivers had actually been regulated. It has been held, however,

that the exemption will apply if the power to regulate exists even though it has not been exercised. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. On the other hand, it is clear that the exemption was not intended to apply where the Commission lacks actual power to regulate hours of work. In the present case, the regulation of only the insubstantial amount of time spent in interstate transportation would leave virtually all the working time of petitioner's truck drivers entirely unregulated. This result would hardly seem consonant with the Congressional concern "that the long hours of truck drivers should be regulated in the interest of public safety." 81 Cong. Rec. 7875. Nor would it seem within the contemplation of legislators who "were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work." 81 Cong. Rec. 7875. If anything is clear, it is that Congress did not intend to leave the long hours of drivers without limit.

The rules of construction that have been applied generally in the interpretation of the Fair Labor Standards Act would be subverted if 97 per cent of covered and nonexempt activities were to be taken out from Section 7 because 3 per cent of other activities, sporadically engaged in, were of a nonexempt character. In the circumstances presented here, the special considerations

affecting construction of Section 13 (b) (1) which this Court, in the *Levinson* opinion, found persuasive of the view there adopted, do not militate against recognition of principles of more general application. The applicability of the exemption where less than a substantial part of the employee's activities affects safety of operation in interstate commerce is a question which this Court left open in the *Levinson* and *Ispass* cases, perhaps in recognition of the possibility that in such circumstances "literalness" in the application of Section 13 (b) (1) "may strangle meaning." See *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44. We submit that here, under the circumstances of the instant case, there is room for application of the principles consistently applied by this and other courts, that the coverage provisions of the Act are to be broadly interpreted (*Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 670; *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123,* 321 U. S. 590, 597) and that exemptions are to be "narrowly construed." *A. H. Phillips, Inc.* v. *Walling,* 324 U. S. 490, 493. With respect to exemptions for the employees of designated types of employers, the courts have held that if an employer engages in activities other than those intended to be exempted, employees in the nonexempt phase of his business are not exempt although literally perhaps within the terms of the exemption. *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (C. C. A. 6); *Walling* v.

Connecticut Co., 154 F. 2d 552 (C. C. A. 2); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Nelson* v. *Agwilines Inc.*, 70 F. Supp. 497 (S. D. N. Y.); *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501 (D. Minn.). And if exempt and nonexempt characteristics of a business are so intermingled as to be inseparable, the exemption has been denied entirely. *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79, 80 (C. C. A. 5); *Guess* v. *Montague*, 140 F. 2d 500, 502 (C. C. A. 4); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.). See also *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 496, where it was stated that an establishment which combined both wholesale and retail functions would not be entitled to the exemption for retail establishments. Similarly in the cases of exemptions provided for employees engaged in designated types of activities, the performance of both exempt and nonexempt activities by an employee in the same workweek has resulted in the loss of exemption. *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C. C. A. 5); *Walling* v. *Haden*, 153 F. 2d 196, 199 (C. C. A. 5); *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2), certiorari denied, 326 U. S. 722; *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.); *Walling* v. *De Soto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.); *Walling* v. *Bridgeman-Russell Co.*, 6 Wage Hour Rept. 132

(D. Minn.); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wis.)

It is clear from these decisions that, in denying exemptions where employees have engaged in both exempt and nonexempt work, the courts have recognized that to apply exemptions merely because some exempt work was performed would remove from the scope of the Act activities which were clearly intended to be subject to its provisions. In the balance between coverage and exemption, the decisions consistently have been in favor of coverage. Apparently this general rule was considered inappropriate to the interpretation of Section 13 (b) (1) because it was thought that exemption from the Fair Labor Standards Act hinged upon coverage under another remedial statute, the Motor Carrier Act. *Levinson* v. *Spector Motor Service, supra; Pyramid Motor Freight Corp.* v. *Ispass, supra.* But considerations deemed to justify a disregard of the salutary rule for the interpretation of exemptions when a substantial part of an employee's activities are subject to the Commission's regulatory power would seem to disappear when these activities are of the insubstantial and sporadic character present in the instant case.

A Congressional purpose was to avoid dual regulation of hours by providing an exemption under the Fair Labor Standards Act for those subject to regulation of hours under the Motor Carrier Act. The facts here, however, would vir-

tually never present the Commission with an actual opportunity for regulating the hours of interstate driving or with a situation in which the maximum limitation pertinent to driving in interstate commerce would be applicable. As we have shown, an employee who made one interstate trip at the beginning of a week could be required to work any number of hours the balance of the week without limit under the Motor Carrier Act and without overtime compensation under the Fair Labor Standards Act. For example, if one of petitioner's drivers spends 2 hours during the first day of his workweek in making a trip to a freight depot to pick up interstate freight, the Commission's maximum hours regulations cannot prevent petitioner from requiring the driver to do interplant hauling for 14 additional hours and during 16 hours a day for the remaining six days, making a workweek of 112 hours. Under petitioner's construction of Section 13 (b) (1), the Fair Labor Standards Act would offer no protection, and the purposes of both statutes would be defeated. Where there is regular engagement in a substantial amount of activities affecting safety of operation in interstate commerce, these activities are more likely to occur with sufficient frequency to have the effect, under the Commission's rules, of limiting indirectly the total hours worked by the employee. But this is not so where, as here, the engagement by an employee in such activities is only for brief periods on sporadic occasions, and, to use petitioner's description, a matter of

"happenstance." As we have seen, in 75.6 per cent of the weeks worked by petitioner's drivers (1438 weeks), all trips were intrastate and no trips were made to freight terminals or boat docks (R. 24–27). In 319 weeks, only a single such trip was made and in 85 weeks two such trips were made (Exhibit "C"). In 1842 out of 1903 weeks worked by the drivers (96.4 per cent), not more than two "interstate" trips were made.[15] Only 3.65 per cent of the total trips of petitioner's drivers (R. 15) are trips with respect to which the Commission's maximum hours regulations could apply. It is clear from these facts that as to any individual employee, the occurrence of such trips at times of the day or of the week which would permit the Commission, even indirectly, to regulate hours effectively cannot be

[15] See Statement, pp. 5–6, *supra*.

As shown in Exhibit "C", two employees made only one trip during the year to a boat dock or other interstate terminal (L. Broughton and B. Trew). Two such trips were made during the year by each of three employees (E. Lafnear, A. McCurry, F. Powers), and two employees made only three such trips (E. Curry and L. Gee). One employee made 10 such trips of a total of 374 in the year but those occurred in the first 14 workweeks only and none occurred in the following 20 workweeks in which he was employed (B. Young). Another employee (M. Preston), who totalled 743 trips during the year, made no "interstate" trips to terminals or boat docks in the first 36 workweeks but made five such trips at intermittent intervals in the next 10 weeks, and only intrastate trips until the end of the year. The employee who made the most trips during the year, totalling 998 (J. Mesic) made 15 "interstate" trips but none occurred in the first 32 weeks in the year.

anticipated in any significant number of instances. Consequently, dual regulation of hours under the two Acts would not, as a practical matter, be produced in any significant degree by holding the hours subject to the maximum hour restriction under the Fair Labor Standards Act, and the reason for departure from the ordinary principle of interpreting exemptions is dissipated.

We think it important in the public interest that the solution of the problem of statutory construction presented by the instant case be one that, in its practical application, will allow to the respective statutes areas of operation which will best effectuate the national policy as derived from both Acts. It seems appropriate, in resolving the problem, to take into account the desirability of minimizing difficulties in administration or application of both Acts, and to favor that construction which will most nearly permit the objectives of each statute to be achieved without, as a practical matter, impairing the application of either of them. Such a practical accommodation of the two Acts can be achieved through a reasonable construction of Section 13 (b) (1) which would in no way affect any power of the Commission.

The serious consequences which would follow the rejection of this construction through adoption by this Court of the construction urged by petitioner may readily be illustrated. Many drivers engaged in the production of goods for

commerce within the meaning of the Act, who have consistently received its overtime benefits, would find those benefits summarily withdrawn whenever their employers, fortuitously or purposely, should choose to send them to a terminal to pick up or deliver a piece of interstate freight. Industries engaged in producing for commerce are constantly receiving and shipping interstate freight. Every employer who chose to reduce his labor costs by eliminating overtime would have an easy means at his disposal, limited only by the bargaining power of his employees. This bargaining power would be correspondingly weaker, of course, in unorganized and low-wage plants where the employees are most in need of the protection of the Act. The unfair competition resulting from cutting wages below fair minimum standards, which the Act sought to eliminate, would be likely to recur in many cases. Dissatisfaction among employees would inevitably arise, and labor strife which the Act sought to avoid would be likely to ensue.

The undesirable results which would ensue from the construction urged by petitioner are not confined to drivers, although drivers are involved in this case. If petitioner's construction is accepted, an employer need only assign employees engaged in clerical work or other non-safety activities to loading, repair work, or "helping" (riding on a truck hauling interstate freight) for a few hours each week, and thus subject them

to the "power" of the Commission in order to avoid any actual regulation of hours whatsoever. By this device employees who had already become entitled to overtime compensation under the Fair Labor Standards Act could have this liability nullified retroactively by the subsequent assignment of a small amount of safety work. Thus, an employee who spent 55 hours during the first 5½ days of the workweek in intrastate driving or other non-safety work, so that he would have been entitled to additional compensation under Section 7 for 15 overtime hours, could be divested of this overtime compensation by the assignment of any amount of interstate driving, "helping," or other safety work during the last afternoon of the week.

These consequences would be the natural result of a construction of Section 13 (b) (1) which would permit an employer to leave the duties of an employee substantially unchanged and at the same time avoid his obligation to pay overtime by having him drive to the freight depot once a week. The fact that many responsible employers would not voluntarily resort to such a practice might mean little, if price-cutting by competitors who did not have such scruples should become widespread. We do not think it can properly be assumed that Congress intended the language of Section 13 (b) (1) to be such a statutory strait jacket. Rather, the unusual consequences which would attend an interpretation under which the

exemption would be applicable whenever an occasional safety activity occurred, suggest that such a construction be avoided. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.[16]

We do not think that the approval by this Court of the "substantial part" rule would actually create any conflict with the power of the Commission, as a practical matter. It may be doubted whether the Commission, in carrying out its safety program, would ever be able as an administrative matter adequately to police intermittent and insubstantial incursions by local carriers into interstate commerce of the kind involved in the

[16] The construction which the Administrator urges here is not the only alternative to the construction advanced by petitioner. Another alternative would be to construe Section 13 (b) (1) as merely requiring the elimination from overtime computations of those hours spent by an employee in activities affecting safety of operation in interstate commerce. Thus, in a workweek of 60 hours, if 2 hours were occasionally spent in such safety work overtime, compensation would be due for 18 hours on the basis of a 58-hour week subject to Section 7. This would satisfy the literal terms of Section 13 (b) (1) and of the Motor Carrier Act, and avoid overlapping of regulation of hours by the two agencies. Of course, dividing the workweek into exempt and nonexempt segments is contrary to the ordinary interpretation of exemptions under the Fair Labor Standards Act. (See cases cited, pp. 30–32, *supra.*) In the usual case the performance of a substantial amount of nonexempt work entirely defeats the exemption. The *sui generis* character of the Section 13 (b) (1) exemption, however, may warrant the adoption of a different interpretation for this particular exemption.

instant case. There is no suggestion in the record that it has done so with respect to petitioner, or that petitioner has actually qualified or is operating under the Commission's regulations. Conceding, as this Court held in the *Levinson* case, that Congress intended to avoid dual regulation of hours, and recognizing, as this Court did in that case, that there is no necessary inconsistency in the simultaneous application of the two schemes of regulation, we think it may well be presumed that Congress had in mind dual regulation in substance and not merely in form, and that in speaking of "employee[s] with respect to whom the Interstate Commerce Commission has power," Congress meant to exempt only those whose activities as such employees occupy at least a substantial portion of the workweek by which the application of Section 7 and the exemption therefrom must be measured. This conclusion is, moreover, in accord with the result consistently reached by the lower federal courts as well as state courts of last resort."

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[17] *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107 (C. C. A. 2); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Musteen* v. *Johnson*, 133 F. 2d 106 (C. C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Porter* v. *Poindexter*, 6 W. H. Cases 586 (C. C. A. 10); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.); *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y.); *Crean* v. *Moran Transp. Lines*, 57 F. Supp. 212 (W. D. N. Y.); *Walling* v. *Palmer*, 67 F. Supp. 12 (M. D. Pa.); *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W. D. Ky.);

Viewing petitioner's operations and his employees' activities in their entirety, we believe, for the reasons given above, that there is nothing in the language or purpose of either Act, in the decisions of this Court, or in the rulings of the Interstate Commerce Commission, which would justify an application to petitioner's drivers of the Section 13 (b) (1) exemption. If the true test is whether they are "plainly and unmistakably within its terms and spirit" (*A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493), it seems evident that the test has not been met in this case. The objectives of neither the Fair Labor Standards Act nor of the Motor Carrier Act would be furthered, or the national transportation policy [18] of Congress implemented, by a construction of Section 13 (b) (1) and of Section 204 (a) of the Motor Carrier Act which would deny overtime

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Anuchick v. *Transamerican Freight Lines, Inc.*, 46 F. Supp. 861 (E. D. Mich.); *Davis* v. *Southern Calif. Freight Lines*, 8 Wage Hour Rept. 1151 (S. D. Calif., 1945); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543 (S. D. Calif.); *Potashnick Local Truck System* v. *Archer*, 207 Ark. 220, 179 S. W. 2d 696; *Colbeck* v. *Dairyland Creamery Co.*, 17 N. W. 2d 262 (S. Ct. S. D., 1945); *Vannoy* v. *Swift & Co.*, 201 S. W. 2d 350 (S. Ct. Mo.); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755 (E. D. Ill.); *Nelson* v. *Allison & Co.* (E. D. Tenn.), 13 Labor Cases, par. 64,021. *Vannoy* v. *Swift & Co.*, *Nelson* v. *Allison & Co.*, and *McDuffie* v. *Hayes Freight Lines*, *supra*, were decided after this Court's decisions in the *Levinson* and *Ispass* cases, *supra*.

[18] 54 Stat. 899.

compensation to petitioner's employees because of their occasional and sporadic engagement, as an incidental part of such a business, in a very small amount of "interstate" hauling for short distances within a metropolitan area in a single State.

B. In any event, in those weeks in which petitioner's drivers do no "interstate" driving, Section 13 (b) (1) can have no application.—The inapplicability of the Section 13 (b) (1) exemption to petitioner's drivers in the large majority of workweeks in which no interstate driving occurred [19] seems clear, since the Commission's power under Section 204 of the Motor Carrier Act extends only to interstate transportation.[20] The Commis-

[19] The record shows that two of petitioner's drivers were engaged exclusively in these intrastate movements of goods during the entire calendar year preceding the filing of the Administrator's complaint (W. Armbruster and J. Wineinger, R. 16, 26, 27, 49). In the "average" week, 75.6 per cent of petitioner's drivers were exclusively so engaged (R. 16, 25, 49). Twenty-six of petitioner's 43 drivers, or 60 per cent, spent all their time in such intrastate driving during 75 to 100 per cent of the weeks worked in the year (R. 26, 27). All but two, or 95 per cent of the drivers, were engaged exclusively in such intrastate hauling during more than half of the weeks worked (R. 16, 26, 27).

[20] Motor Carrier Act, Secs. 202 (a), (b), 203 (a) (14); *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695, 708; *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 673, 685; *Ex parte Nos. MC-2 and MC-3* (Conclusions of Law Nos. 1, 2), 28 M. C. C. 125, 139; *Ex parte No. MC-28*, 13 M. C. C. 481, 482, 488.

sion has recognized this limitation on its authority in its ruling that "if such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week." *Ex parte No. MC–3*, 23 M. C. C. 1, 39. The workweek is, of course, the accepted standard for measuring overtime obligations under the Fair Labor Standards Act. *Overnight Motor Corp.* v. *Missel*, 316 U. S. 572; *Roland Electrical Co.* v. *Black*, 7 Wage Hour Cases 167 (C. C. A. 4); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678 (C. C. A. 8); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (W. D. Ky.). Accordingly, irrespective of whether the exemption is applicable to any of the drivers in workweeks when they make "interstate" trips, it seems clear that they are subject to Section 7 of the Act in workweeks when they perform no work to which the Commission's power relates. *Reynolds* v. *Rogers Cartage Co.*, 71 F. Supp. 870 (W. D. Ky.); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1947.

APPENDIX A

Section 13 (b) (1) of the Fair Labor Standards Act. (c. 676, 52 Stat. 1060, 29 U. S. C., 201, *et seq.*) provides:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *

The pertinent portions of the Motor Carrier Act (August 9, 1935, as amended, c. 498, 49 Stat. 543, 49 U. S. C. 301) provide:

> SEC. 202. (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.
>
> (b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.
>
> * * * * * *

SEC. 203. (a) As used in this part—

* * * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part 1, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part 1.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * * *

SEC. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *

APPENDIX B

The following extracts constitute the complete debates on the Section 13 (b) (1) exemption of the Fair Labor Standards Act.

Extracts from Cong. Rec., 75th Cong., 1st sess., Vol. 81, Part 7, pp. 7875–7876.

FAIR LABOR STANDARDS IN INTERSTATE COMMERCE

The Senate resumed the consideration of the bill (S. 2475) to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

* * * * *

The amendment to the amendment was agreed to.

Mr. MOORE. Mr. President, I send to the desk an amendment, which I offer to the amendment of the committee.

The PRESIDING OFFICER. The amendment to the amendment will be stated.

The CHIEF CLERK. It is proposed, on page 51, line 2, after "3);", to insert the following:

> or any employee of any common carrier by motor vehicle subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935 (U. S. C., title 49, ch. 8) provided that the wage provisions of this act shall apply.

Mr. MOORE. Mr. President, strictly speaking, the amendment does not provide an exemption. It refers to the drivers of busses. The bill itself provides that its provisions shall not apply to any railway employees subject to the provisions of the Hours of Service Act.

Of course safety is the important consideration. Under the Interstate Commerce Act it is provided that it shall be the duty of the Interstate Commerce Commission to regulate the qualifications and maximum hours of service of employees of common carriers. Following out that provision and with due regard to safety, the Commission has made a report fixing the hours of labor of bus drivers and employees. My amendment seeks only to include them, as well as railroad engineers and employees, under the terms of the bill. I may say that the amendment has been included in the similar bill now pending in the House.

Mr. BLACK. Mr. President, it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.

The amendment of the Senator from New Jersey [Mr. MOORE] would apply the same principle to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.

Mr. MOORE. Yes; it has been done during the present month.

Mr. BLACK. That has occurred since the hearings before the committee. The committee were of the opinion, when we originally took up the bill for consideration, that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. That

had not been done by any other governmental agency at the time of the hearings. Consequently the amendment was not adopted by the committee.

Speaking for myself personally, it is my belief that it would certainly be unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission, since it has the power and has exercised it, should be the agency to be entrusted with this duty. We were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work. Undoubtedly the Interstate Commerce Commission has adopted a regulation under that law. So far as the pending amendment is concerned, and so far as concerns the amendment which is to be submitted by the Senator from New York [Mr. COPELAND] with reference to certain employees in the aviation service who are now under the Railroad Labor Act, it is my own belief that both of the amendments should be adopted.

Mr. SHIPSTEAD. Mr. President, I could not hear all the discussion. When I heard the amendment read the matter of truck drivers came to my mind. Am I to understand the Senator from Alabama to say that the Interstate Commerce Commission is now undertaking to regulate hours and wages of truck drivers?

Mr. BLACK. Not wages, but hours of labor.

Mr. SHIPSTEAD. I have reliable information that at least up to 10 days ago truck drivers in my State were being paid $9.60 a week for a 48-hour week. Is there any provision in the bill that can

reach such a situation? Under the ruling of the Interstate Commerce Commission or under the provisions of the bill now before the Senate, can that situation be controlled? Those men are compelled to work for $9.60 per 48-hour week and feed and clothe themselves. That is a situation which to my mind is glaringly bad.

Mr. MOORE. Mr. President, I do not by my amendent seek to fix wages. It relates merely to hours of labor. Under the Interstate Commerce Act the Interstate Commerce Commission is given authority to prescribe maximum hours and qualifications for service. My amendment seeks only to leave the fixing of hours, but not the fixing of wages, with the Interstate Commerce Commission. The bill would take care of the wage question.

Mr. SHIPSTEAD. May I have the assurance of the Senator from Alabama [Mr. BLACK], chairman of the committee, that the bill now before the Senate will take care of a wage situation such as I have described?

Mr. BLACK. Mr. President, as the bill is now written, employees of trucking companies are included in both the minimum-wage and maximum-hour provisions. The amendment of the Senator from New Jersey [Mr. MOORE] would exempt them only from the maximum-hour provision. The question of minimum wages would still be governed by the provisions of the bill. The reason why the Senator from New Jersey is offering the amendment is that the law now imposes upon the Interstate Commerce Commission the responsibility and duty of regulating hours.

As I said, speaking for myself alone, I am of the opinion that it would be very unwise indeed to

seek to entrust the same responsibility to two governmental agencies.

Mr. SHIPSTEAD. I agree with that.

Mr. BLACK. I further believe, inasmuch as the Interstate Commerce Commission regulates truck and railroad employees, and insofar as the law relates to certain aviation employees, the regulation of the hours of such employees should remain with the Interstate Commerce Commission under those laws. Therefore, I do not object to the amendment which has been offered by the Senator from New Jersey.

Mr. SHIPSTEAD. If a trucking company employs 10 persons or less, will this bill apply to it as to wages?

Mr. BLACK. Not if the bill is finally passed with the amendment which was adopted. It would not include any business of any type with 10 employees or less.

Mr. SHIPSTEAD. Then truck drivers would have no remedy if their employer employed 10 persons or less?

Mr. BLACK. The same thing would be true with reference to the employees of any business, because under the amendment which was adopted by the Senate the bill would not apply to any business which employs less than 10 persons.

Mr. MOORE. The interstate commerce law would apply as to hours.

Mr. SHIPSTEAD. As to hours but not as to wages?

Mr. MOORE. No, sir.

Mr. SHIPSTEAD. I am interested in wages.

Mr. COPELAND. Mr. President, in view of the statement of the chairman of the committee, I suggest that my colleague from New Jersey [Mr.

MOORE] modify his amendment by adding, after the parenthesis on line 5, the words:

> And any air transport employee subject to the provisions of title II of the Railway Labor Act approved April 10, 1936.

Mr. MOORE. I accept that modification.

The PRESIDING OFFICER. The question is on agreeing to the modified amendment offered by the Senator from New Jersey [Mr. MOORE] to the amendment reported by the committee.

The amendment to the amendment was agreed to.

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INDEX

	Page
Statement	1
Argument	20
Driver Trips	29
Mechanics	39

CASES CITED

American Sheet & Tin Plate Co. et al. v. *United States*, 301 U. S. 402	13
A. T. & S. F. Ry. v. *K. C. Stock Yards Co.*, 33 I. C. C. 92	12
Baltimore & O. R. Co. v. *I. C. C.*, 221 U. S. 612	38
Chicago & Alton Ry. v. *United States*, 156 Fed. 558	12
Crane Iron Works v. *United States*, 209 Fed. 238	13, 14
Fletcher v. *Grinnell*, 150 F. (2d) 337	24, 26
Gregg Cartage Co. v. *United States*, 315 U. S. 74	16
Labor Board v. *Fainblatt*, 306 U. S. 601	22, 40
Levinson v. *Spector Motor Service*, 330 U. S. 649	9, 22, 23, 24, 25, 27, 33, 38, 39
Los Angeles Switching case, 234 U. S. 294	13
Maurer v. *Hamilton*, 309 U. S. 598	36
Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405	26
N. Y. C. & H. R. R. Co. v. *General Electric Co.*, 114 N. E. 115	12
Pyramid Motor Corp. v. *Ispass*, 330 U. S. 695	39
San Pedro, L. A. & S. L. R. Co. v. *United States*, 213 Fed. 326	38
S. C. Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177	26
Southern Ry. v. *R. R. Comm., Indiana*, 236 U. S. 439	38
Southland Co. v. *Bayley*, 319 U. S. 44	9, 25, 37
Staley Mfg. Co. Terminal Allowance Case, 245 I. C. C. 383	15
Swift & Co. v. *H. V. Ry.*, 243 U. S. 281	10
Tank Car Corp. v. *El Dorado Term. Co.*, 308 U. S. 422	14
Terminal Allowance Cases, Ex Parte 104, 209 I. C. C. 11	13
United States v. *American Trucking Asso.*, 310 U. S. 534	37
United States v. *N. Y. C. R. Co.*, 272 U. S. 457	36
United States v. *Southern Ry.*, 222 U. S. 20	38
United States v. *Wabash*, 321 U. S. 403	13, 14, 15
United States v. *Wrightwood Dairy Co.*, 315 U. S. 110	36
Wickard v. *Filburn*, 317 U. S. 111	36
Wisconsin R. R. Comm. v. *C. B. & Q. R. Co.*, 257 U. S. 563	36, 37

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

This brief amicus curiae is submitted by the Interstate Commerce Commission at the suggestion of the Court.

The question before the Court involves the status under the exemption provision of section 13 (b) (1) of the Fair Labor Standards Act of certain employees (including drivers and mechanics) of a common carrier of property by motor vehicle, the carrier being engaged in interstate and foreign commerce although its trans-

portation is principally intrastate and its vehicular operations are conducted within one State.

The suit in the District Court was instituted by complaint of respondent asking that the petitioner, doing business under the name of J. F. Morris Cartage Company, be enjoined from violating the provisions of said Act, prescribing, as to employees "engaged in commerce or the production of goods for commerce," the maximum hours that they may be employed in any workweek unless paid for overtime at the rate of one and one-half times their regular wage (52 Stat. 1060, sections 7, 15 (a) (1) and 15 (b) (2)). Following the filing of an answer and an agreed stipulation of facts, the case was heard and the complaint dismissed, the District Court holding (1) that neither the carrier nor its employees were engaged "in the production of goods for commerce" within the meaning of the Labor Standards Act, and (2) that, to the extent they might be considered to be "engaged in commerce" within the meaning of said Act, the overtime pay provisions of section 7 were rendered inapplicable by section 13, in that the carrier's employees involved "were either employees employed in a bona fide executive or administrative capacity; i. e., dispatchers and superintendent of maintenance within the (exempting) language of section 13 (a) (1) or employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to section 204

of the Motor Carrier Act, 1935; i. e., truck drivers and garage employees, within the (exempting) language of section 13 (b) (1)" (R. 39, 40).

Upon appeal, the Circuit Court of Appeals, Sixth Circuit, reversed the judgment of the District Court (R. 47–54). On April 7, 1947, this Court granted the carrier's petition for writ of certiorari "limited to the second question presented," to wit:

> 2. Where such employees (employees of a common carrier by motor vehicle) during a minority of their time, are engaged in the transportation of interstate traffic, are they exempt under the provisions of Section 13 (b) (1) of the Act from the maximum hours provision of Section 7 of the Act * * * (Pet., p. 3).

As shown by the stipulated facts, petitioner motor carrier employed in 1941 approximately 40 truck drivers, 14 garage workers, certain of whom were mechanics, 3 dispatchers and 3 general office workers. Its equipment consisted of approximately 50 trucks and 60 trailers of various types. Its operations were centralized at a main garage and yard in Ecorse, Michigan, which were used "as a dispatching office, general maintenance and repair garage and storage space for equipment when not in active use" (R. 11, 12), and its principal customers were two subsidiaries of the National Steel Corporation, namely the Great Lakes Steel Corporation and Michigan Steel Corporation, both located at Ecorse (R. 20).

By subparagraphs A to E, inclusive, of Paragraph I (R. 12, 13), the stipulation of facts separates into 5 categories the types of operations performed by petitioner, and, by a table, designated as Exhibit A (R. 20, 21), it shows generally the percentage of petitioner's total 1941 revenue attributable to each such type of operation. While it is thereby shown (R. 12, 20) that, of petitioner's total 1941 revenue, approximately 96.7 percent was derived (1) from intraplant services performed for the Great Lakes and Michigan steel companies and (2) from shipments of freight (mostly "outgoing steel") transported for the account of the said two companies, it is also shown that petitioner held itself out to perform for the general public (R. 11, 12), and during the year 1941 did in fact perform for about 45 concerns in addition to the two steel companies (R. 20, 21), a general trucking service as a common carrier by motor vehicle.

Referring first to subparagraph B, Paragraph I, of the stipulation (R. 12): Approximately 35 percent of petitioner's operations is shown to consist of the transportation of steel within the plants of the Great Lakes and Michigan steel companies from one mill or portion thereof to another, or between the mills of those two companies; and such steel "is so transported for the purpose of further processing in the course of manufacture." "In these operations the (peti-

tioner's) trucks often operate within the plant and without leaving the plant for several days" (R. 12). Referring next to subparagraph A, it is there shown that a further approximately 60 percent of petitioner's operations consists of the transportation of steel (principally bumper stock, fender stock and other steel products, R. 14) from the mills of the Great Lakes and Michigan steel companies "at Ecorse, Michigan, to plants of various automobile manufacturers and other industrial establishments in the Detroit Metropolitan area." This transportation of petitioner, in contrast to its operations described in subparagraph B, is obviously conducted over the public highways and is of a kind or type which petitioner holds itself out to perform for the general public and which it does perform for numerous shippers other than the two steel companies. (See subparagraph E, Paragraph I, R. 13, and the first subparagraph of Paragraph II, R. 14.)

Taking up the remaining subparagraphs of Paragraph I (R. 13) in their order: As shown by subparagraph C, a further approximately 3 percent of petitioner's operations consists of the transportation of freight between the plants of the Great Lakes and Michigan steel companies, "on the one hand, and, on the other, interchange points, such as boat docks, railroad depots, freight terminals, and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries

of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers, and line-haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the (petitioner) and such other interstate carriers." As shown by subparagraph D, a further approximately 1 percent of petitioner's operations consists of the transportation of freight from various industrial establishments in the Detroit Metropolitan Area to the plants of the Great Lakes and Michigan steel companies. And, as shown by subparagraph E, a further approximately 1 percent of petitioner's operations consists of transportation of miscellaneous freight in general cartage for shippers other than the two steel companies, including transportation of such freight moving in interstate commerce.

Following the separation made of petitioner's operations into the types of transportation described in subparagraphs A to E, inclusive, of Paragraph I, the stipulation, as shown in Paragraph III (R. 15, 16), makes certain analyses of the driving activities of petitioner's drivers based on the number of trips made by such drivers in connection with transportation of the types described in said subparagraphs of Paragraph I. Out of a total of 19,786 trips by all drivers during

the year 1941, it is shown that 724 trips or 3.65 percent were pick up or delivery trips (of the types described in subparagraphs C or E) involving transportation of interstate freight and that the remaining 19,062 trips or 96.35 percent represented "interplant transportation" of the types described in subparagraphs A, B, and D. It is further shown as follows: That, in an average workweek, 75.6 percent of the drivers were exclusively engaged in "interplant trips" of the types described in subparagraphs A, B, and D and the remaining 24.4 percent made one or more pick up or delivery trips (types C and E) of freight moving in interstate or foreign commerce; that the "average employee" was exclusively engaged in "interplant transportation" (types A, B, and D) during 75.6 percent of the workweeks in 1941; that two employees were exclusively engaged in "interplant transportation" during the full period of their employment in 1941; and that, with two exceptions, all of petitioner's drivers were exclusively engaged in such "interplant transportation" during the greater part (50 percent or more) of the workweeks in 1941.

From the above, it appears that, for purpose of consideration of the question of applicability of the Fair Labor Standards Act, the general basis of separation of driver trips as made is as between pick-up and delivery trips made in transporting freight moving in interstate or foreign commerce,

on the one hand, and on the other, trips in performing "interplant transportation"; and that the latter include, not only trips in performing intrastate transportation of common carrier kind and over the public highways (i. e., transportation of type A or type D kind), but also trips in performing purely plant service (type B kind), confined to movements within the plants of the Great Lakes and Michigan steel companies.[1] The analyses of driver trips (R. 15, 16), in thus treating trips in performing plant service or movements as of the same general class as trips in performing transportation of types A and D kinds, are, it seems evident, particularly concerned with the facts as to the types of trips involved in their bearing on the question, originally in the case but not included in the review here, of whether petitioner's drivers were "engaged in the production of goods for commerce" within the meaning of section 3 (j) of the Fair Labor Standards Act. But that question is quite distinct from the question under review here of whether they are not in any event exempt from section 7 of that Act as employees within the meaning of section 13 (b); that is, as employees with respect to whom the Commission has power to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act of 1935.

[1] Except, perhaps, that such of the movements as are between the mills of the respective companies (R. 12) may be over-the-road, or highway movements.

Petitioner's status as an interstate common carrier by motor subject to the Act is affirmatively shown in the record and is not disputed by the Circuit Court of Appeals or by respondent. Accordingly, the question whether its drivers are employees with respect to whom the Commission has power to establish qualifications, etc., does not depend on the purpose or objectives of the Fair Labor Standards Act but is to be determined solely from the language and remedial purpose of the Motor Carrier Act, which embodies Congress' legislation for promotion of safety on the public highways of the country. *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 677; *Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49. The question is essentially, then, one as between federal and state authority in the matter of safety on the public highways, with the principle applying, presumably, that in cases of conflict federal authority is paramount. The consideration that 35 percent of petitioner's operations, or driver trips, consist of operations, or trips, in performing plant service—a private service—does not, it is believed, take from the Commission its authority over the maximum hours of the drivers of a carrier subject to the Act in performing that part of its operations, nor in respect of their qualifications. But the very fact that it does not, definitely raises the question of the propriety of including as a part of so-called "interplant trans-

portation", or "interplant trips," the operations, or trips, in performing plant service. Whatever the warrant for such inclusion in connection with the Section 3 (j) question,[2] above mentioned, the effect thereof in connection with the question here is different. For, the inclusion as a part of said "interplant transportation" of the plant service trips (Type B) along with the common carrier highway trips (Types A and D) in transporting intrastate freight has the appearance of inflating the number, or percentage, of trips subject to State authority and at the same time of diminishing the number or percentage of trips aligned as subject to Congress' safety legislation (see R. 49, 53).

Even assuming that the jurisdiction of the federal legislation is no greater in respect of the 35 percent of plant service trips or operations than

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[2] The analyses of driver trips, by including the trips in rendering plant service (Type B) as trips in performing "interplant transportation," treats them as trips of the same general class as the driver trips in transporting intrastate freight (Types A and D). For purpose of the particular question in issue here, such treatment of the Type B ignores the basic facts appearing in the stipulation itself, showing that such trips are not trips in the transportation of intrastate freight over the public highways. Cf. *Swift & Co.* v. *H. V. Ry.*, 243 U. S. 281, 286, 289. The issue here, involving as it does, a construction of Congress' legislation for promoting highway safety, is an issue affecting the general public interest and, therefore, it has seemed warranted and important to emphasize the discrepancy in the analyses so far as their use in connection with that issue is concerned.

that of the State, still the alignment of the plant service trips on the State authority side has like effect and a considerable one in the comparative percentage showings set out in the analyses of driver trips. While it is not believed that the Commission's jurisdiction depends upon the percentage of petitioner's operations and driver trips in interstate transportation, still, since the showing made by the analyses is predominantly a percentage showing, it seems necessary to refer to the effect of the alignment of plant service trips thereby made along with the description of the stipulation of facts and of the said analyses predicated thereon.

As above shown, the 35 percent of petitioner's operations described in subparagraph B, paragraph I of the stipulation is performed within the plants of the two steel companies, or between the mills of those companies. "In these operations, the (petitioner's) trucks often operate within the plant and without leaving the plant for several days." The operations consist of the "transportation from one mill or portion thereof to another" of steel for "further processing in the course of its manufacture." Such transportation, performed by petitioner, constitutes an integral part of the industrial operations of the steel companies—as much so as if the movements of steel were made by a conveyor or electric crane operated directly by the companies. Cf. *Chicago*

& A. Ry. v. *United States*, 156 Fed. 558, 561; *N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 118. Plainly, the petitioner, in rendering such service, is the mere agent of the companies, it, or its employees, performing the trucking movements of steel under the direction and control of the companies and presumably when, where and as needed in the industrial operations.[3]

Plant service such as petitioner motor carrier performs for the two steel companies is frequently performed by the railroads operating on and over the plant tracks of shipper industries. "Plant service is private service. Its distinguishing characteristic is that it is performed in the interest of particular shippers and that the facilities employed are not available or accessible to shippers generally." *A. T. & S. F. Ry.* v. *K. C. Stock Yards Co.*, 33 I. C. C. 92, 99. The service may

[3] In the rendering of the service, the petitioner is not left with the independence which is part of the attributes of a carrier. The steel which petitioner hauls "from one mill or portion thereof to another" is steel in the course of processing into finished products, namely, bumper stock, fender stock, etc. (R. 14, 48). That is to say, petitioner's Type B haulage is an integral part of the industrial operations in the sense that it is a real part of the plant operations, and it (or like haulage) is essential to the production of the articles which the two steel companies turn out as their finished products. It is as such subordinated agent that petitioner, in rendering the plant service, is the mere agent of the two subsidiaries of National Steel.

be performed by a common carrier or other public agency but the test as to whether it is private service is the character of the service rendered and not of the agency rendering it. *Idem; Crane Iron Works* v. *United States,* 209 Fed. 238, 243–244. A form of plant service familiar to the Court is that involved in the *Terminal Allowance* cases, *Ex Parte 104,* 209 I. C. C. 11, which have been involved in several of the Court's decisions, including *U. S.* v. *Wabash R. Co.,* 321 U. S. 403, 409–410. Broadly stated the question in those cases was whether the placement of cars on so-called interchange tracks at or near an industrial plant accomplished the delivery ending the transportation service or whether the industry was entitled to have the cars carried over plant tracks and "spotted" at designated unloading points. The administrative criterion or test determinative of the question is whether, under the operating conditions and related circumstances obtaining at a plant, the service entailed in such "spotting" of cars at desired unloading points is in excess of that involved in "spotting" cars on the carrier's team tracks or on ordinary industry spurs or side-tracks. *Am. Sheet & Tin Plate Co. et al.* v. *United States,* 301 U. S. 402, 409, 411. Where the Commission finds that the service involved in "spotting" cars at a plant is in excess of such criterion, or standard, its conclusions, generally

stated, are that the interchange tracks are reasonably convenient points for making delivery; that the "spotting" beyond is plant service for the industry and not common-carrier service covered by the line-haul rates; and that the performance thereof free (i. e., without charge in addition to the line-haul rates) constitutes the according of a preferential service not accorded to shippers generally and an in effect refunding or remitting of a portion of the published rates, all in violation of section 6 (7) of the Act. *United States* v. *Wabash R. Co., supra,* 410, 411.[4]

Another form of plant service often performed by the railroads for large industrial plants is so-called intraplant switching. In contrast to the plant service above described, this service is wholly disconnected from any preceding or succeeding road haul (*Crane Iron Works* case, *supra,* p. 244) and is thus irrefutably private service. In this respect it is like the plant service performed by petitioner for the two steel companies and, as there, it may consist of movements from one mill or portion thereof to another; or it may consist, for example, of movements of waste materials to dump piles or movements of coal, or ore, from stock piles to furnaces. When performing

[4] Cf. *Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 431–432, involving violation of Elkins Act.

such plant service—intraplant switching—the railroads exact, and commonly file with the Commission, so-called intraplant switching charges.[5] The service is, as stated, purely plant or private service, but similarly as in the case of "spotting", found to be plant service, its performance for a shipper free of charge would violate section 6 (7) of the Interstate Commerce Act and presumably the Elkins Act as well.

Accordingly, the authority and control which the Commission thus has over plant service—a private service—flows importantly from its authority and duty to enforce[6] section 6 (7) of the Act and the Elkins Act, the broad and well-known remedial purposes of which are to require rate uniformity and to put a stop to inequality of treatment in whatsoever form appearing. The question here is as to the scope of federal legislation of unquestionably equally broad and important purpose—the purpose of promoting safety on the public highways. The scheme of the legislation to that end is, it is apparent, directed to the controlling of that particular form of danger incident to the use of the public highways by motor carriers in transporting traffic practically

[5] See *Staley Mfg. Co. Terminal Allowance* case, 245 I. C. C. 383, footnote 6, p. 385. This report was involved in *U. S.* v. *Wabash R. Co., supra.*

[6] In some cases by its own orders; in others directly through the courts.

of all kinds.[1] Of great importance to the program is the authority given the Commission to prescribe the qualifications of those employees of motor carriers who drive the vehicles—often of great size—and their maximum hours of service; and it is that authority which is directly involved here.

In *Ex Parte No. MC–2*, 11 M. C. C. 203, 205–206, the Commission refers to the operations of carriers transporting equipment for use in the oil fields which involve a situation not different in principle or substance from that involved here. After leaving the highways, the drivers of these carriers may for days "be engaged in work not connected with transportation." Such carriers "perform a service beyond that of merely transporting the property by motor vehicle," in that "they move derricks and oil-well machinery and supplies from one location to another," "erect the derricks, place the machinery and lay the pipe." The vehicles "are equipped with winches, cranes and other paraphernalia," and "the driver's principal duty is to operate" the same "in erecting the derricks, installing machinery and laying the

[1] Such transportation over the highways is a service of great importance to the commerce of the country, this being best evidenced by the thousands of motor carriers in operation in the country. Cf. *Gregg Cartage Co.* v. *U. S.*, 315 U. S. 74, 84. But the very fact that it is a service of great importance, furnished by thousands of carriers and their many vehicles, is the thing making Congress' safety program one of vital importance to the general public using the highways.

pipe" (p. 205). When oil or gas is struck, "it is necessary that the wells be capped and that pipes be laid to storage tanks and reservoirs, in order that large quantities of oil be not wasted" (p. 206). Answering the carriers' contention "that it would be impossible for them to perform the required service and at all times comply with the rule prescribing the weekly maximum on duty," the Commission said (p. 206):

> It must be borne in mind, however, that after the driver has worked for these long periods in the oil fields, he must drive the motor vehicle to the home terminal over the highways of the country. The testimony submitted by this class of carriers, that they have need for a longer weekly maximum than 60 hours, was persuasive. After careful consideration we have reached the conclusion that, important as these considerations are, they do not overcome our primary duty to prescribe maximum hours which will be reasonably safe. No adequate reason was shown for making a change in rule 3 (a) insofar as it affects this type of operation.

It will be seen that, in such operations, the work of the carriers and drivers, in the oil fields after leaving the highway, is (like the situation here) a real part of the oil company operations in producing the oil. Nevertheless, the rule as to weekly maximum on duty hours applied and the Commission did not believe that there was war-

rant for making any change. Petitioner's drivers used in performing the plant service here, are, it is apparent from the record (see Exhibit C–2, R. 26), also used without distinction, and as need arises in its common carrier highway driving both interstate and intrastate. One of the purposes of the weekly limitation on hours is to prevent that type of fatigue or exhaustion that is not readily recoverable from, and it is plain that could as surely result from excessive hours in performing plant service as in driving in common carrier service.

Whatever the number or percentage of petitioner's trips in transporting interstate freight over the highways, it is, as above stated, indisputably a common carrier by motor subject to the Interstate Commerce Act and the Commission's jurisdiction. There are very many motor carriers operating over the highways of the country whose interstate business, like that of petitioner's, constitutes a minor proportion of their whole business. Yet, in the aggregate, such interstate business represents a vast volume of interstate traffic carried over the highways in practically countless trucks and combination tractor-trailer vehicles. Also, there are many motor carriers which, like petitioner, perform plant service or other form of service outside the category of carrier transportation. Some of the States have clothed boards, or commissions, having jurisdic-

tion over motor carriers, with authority, like that of the Commission, over the qualifications and maximum hours of drivers. Others have acted in the matter by direct statutory provisions. But although some considerable uniformity has been brought about, it has by no means been achieved. 3 M. C. C. 665, 683–686; 23 M. C. C. 1, 14–21.

Moreover, while trips, or movements, in performing plant service are generally wholly within a State, they are not carrier movements in the intrastate transportation of freight. Doubtless State Boards, having authority over the intrastate transportation of a carrier, are able to indirectly control the hours of drivers performing plant service through their direct authority over the drivers' hours when driving in intrastate transportation over the highways. But, even assuming the Commission's authority over petitioner and its drivers in performing the plant service here was of the same limited sort, still there would be no warrant for showing, as in effect done by the exhibits, the driver trips in performing such service as subject to State authority. For in that case they would be as much subject to federal as to State authority.

However, any such assumption of like authority overlooks the fact that federal authority is paramount in the field occupied. The plant service is not intrastate transportation but private service. Petitioner is subject to the Act and to Congress'

legislation for promotion of safety on the highways and there is no reason to believe that it has not conferred full and effective authority over the hour of petitioner's drivers in performing the plant service.

The stipulation shows that during the regular course of its business in 1941, petitioner employed 14 garage workers, an unspecified number of which were mechanics (R. 11). Assuming that the painters and washers, referred to, did "nothing but paint the vehicles" or wash them, that is, did no work "which affects safety of operation directly" (*Ex Parte No. MC–2*, 28 M. C. C. 125, 133), the only garage workers of concern here are the mechanics. And, since the stipulation does not qualify the word in any way, it would seem that those garage workers must be considered to have been "mechanics" (*Idem*, 133).

ARGUMENT

In passing upon the question whether petitioner's drivers were exempted from Section 7 of the Fair Labor Standards Act by Section 13 (b) (1) thereof, the Circuit Court of Appeals says in its opinion (R. 52–53) that it had theretofore adopted the rule that a driver engaged in driving trucks both in interstate and intrastate commerce must, in order to come within the exemption, devote a substantial part of his time to driving in interstate commerce. As to the question

whether the showing as to petitioner's drivers met the test, the court says:

> It appears unnessary to attempt to answer that question definitely in this case, as the stipulated facts fail to show more than a very small proportion of time devoted to interstate transportation. The burden is on the employer to bring himself within the exemption. *Fletcher* v. *Grinnell Bros., supra.*

The Court had previously referred (R. 49) to the several precentage showings, appearing in the stipulation, of driver trips made in interstate commerce as compare with those made in "interplant transportation." The figures it sets out also disclose that petitioner and its drivers made 724 trips in 1941 in the interstate transportation of freight over the highways. The Court, however, although apparently conceding that by reason of such trips and its holding out, petitioner was a common carrier in interstate commerce subject to the Interstate Commerce Act, nevertheless, devotes no discussion to that fact or to the effect or import of its decision on Congress' legislation for promotion of highway safety. As already pointed out, there are very many motor carriers subject to the Act whose interstate business is a minor part of their traffic, and yet, in the aggregate, such business constitutes a vast volume of interstate traffic carried over the highways of the country in a continuing stream of vehicles. With

the exception perhaps of carriers whose interstate business is so insignificant in volume that "the Courts would apply the maxim *de minimis*" (Cf. *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607), it seems clear that any rule excluding from Congress' safety legislation carriers in fact operating interstate would operate greatly, or in any event most "substantially" to defeat that legislation. Moreover, the suit here is not for recovery of past overtime wages claimed to be due but is one for an injunction operating *in futuro*. It is reasonable to expect that motor carriers engaged in interstate commerce will make every effort to increase their business with the result in many cases of progressive increases in their interstate business and traffic moving over the highways.

The guide here is the remedial purpose of Congress' highway safety legislation and not that of the Fair Labor Standards Act. *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 657, 677. And the question in issue here is not whether a substantial part of the activities of the drivers affect safety but is whether, or to what extent, the Federal safey legislation has, in its operation on interstate motor carriers, superseded the authority of the States. That is not to say that, in the case of drivers, the question of whether a substantial part of their activities affect safety might not prove to be one of importance (*Idem*, 677). But here neither the Circuit Court of Appeals nor

respondent question either that a substantial part of the drivers' activities affected safety or that a substantial part of their time was spent in safety work. In fact, it must be concluded that the record affirmatively and forcibly shows that a substantial part of the drivers' activities did greatly affect safety. The record showing is in the form of driver trips—thousands of driver trips in transporting freight over the highways. So far as driver-employees are concerned, it may be said, that every moment of their time while driving over the highways obviously affects safety (*Idem*, 678). That is matter of common knowledge.

The decision of the Circuit Court of Appeals does not dispute this. The effect of the decision is that, while the court accepts the fact that the driver's trips—all of them—affected safety, it holds that the record fails to show that that part, or proportion, of the trips, or driver time, devoted to interstate driving was sufficient to meet the rule (adopted in earlier cases) that, where drivers of trucks drive both interstate and intrastate, they must, in order to come within the exemption from the Labor Standards Act, devote a substantial part of their time to interstate driving. "The burden," the court says, "is on the employer to bring himself within the exemption" (R. 53).

Although, in the above, the Court to a certain extent recognizes that the question is one of jurisdiction as between federal and state authority in

the matter of safety on the highways, nevertheless it is entirely clear that its decision mostly hinges on the thought that, in any application of the exempting provisions of section 13 (b) (1) of the Fair Labor Standards Act, the remedial purpose of the latter Act should be looked to and, therefore, that the said exempting, or excepting, provisions should be narrowly construed and interpreted. See cases cited in support, including *Fletcher* v. *Grinnell,* 150 F. (2d) 337, 340. But, as stated in the *Levinson* case, *supra,* p. 682, while generally an expansion of the jurisdiction of the Labor Standards Act does not conflict with jurisdiction established under other Acts of Congress, "here every expansion of jurisdiction of the Act through interpretation of section 13 (b) (1) cuts down the jurisdiction of the Commission under section 204 of the Motor Carrier Act."

As above shown, the Circuit Court of Appeals, in concluding that petitioner's drivers did not come within the exemption of section 13 (b) (1) of the Labor Standards Act, did not support the conclusion by any express holding as to the status of the drivers under section 204 of the Motor Carrier Act. It simply referred to, and relied on, its rule that, in order to come within the exemption, such drivers must be shown to have devoted a substantial proportion of their time to interstate driving, the court adding that the "burden is on the employer to bring himself within the exemp-

tion." But any conclusion that employees do not fall within said exemption must, or should, of course, be bottomed on the holding that they are not employees with respect to whom the Commission has power to prescribe qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act. And, in arriving at such holding, the sole guide is the language and remedial purpose of the Motor Carrier Act, which embodies Congress' legislation for promotion of safety on the highways. *Levinson* case, *supra*, p. 677; *Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49. It follows that the remedial purpose of the Labor Standards Act is not the guide and also that the burden of establishing his case remains with a plaintiff and that the burden is not on an employer to bring himself within the exemption.

Accordingly, the basic question in issue is, as above stated, whether, or to what extent, Congress' legislation for promotion of highway safety has, in its operation on motor carriers subject to its jurisdiction, superseded the authority of the States. "The need for uniformity in the matter of qualifications and maximum hours of employees is patent (*Ex Parte No. MC–4*, 1 M. C. C. 1), and there is nothing in the legislation to indicate other than that Congress intended to exercise the full authority it possessed. In connection with the scope of its authority, important general considerations, it would seem, are the great changes

which in comparatively recent years have taken place in highway transportation and travel; that these changes, particularly in the main highways, have in important measure been brought about by federal aid, both by grants of money and expert advice and supervision; and that, as a result of the changes, interstate use of the public highways has been greatly stimulated, not only by motor carriers, but by the general public traveling in private vehicles. See generally, *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 416 et seq.; *Maurer* v. *Hamilton*, 309 U. S. 598, 604–605; *S. C. Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184. That the federal government's responsibility has kept pace with these changes seems a logical and necessary conclusion and also that the federal highway safety legislation was enacted to meet such responsibility.

It has been above emphasized that the Circuit Court of Appeals, in concluding that petitioner's drivers did not come within the exempting provisions of the Labor Standards Act (that is, were not employees with respect to whom the Commission's authority attached), based its conclusion on the holding that it was not shown that a substantial part of their time had been devoted to driving in interstate transportation. This test, or criterion, the court used in the view that the exemption should be narrowly interpreted and applied, citing *Fletcher* v. *Grinnell, supra*, p. 340.

But the effect of thus narrowly interpreting the exemption in section 13 (b) (1) was to expand the jurisdiction of the Labor Standards Act, and, as pointed out by this Court in the *Levinson* case, *supra*, p. 682, "every expansion of jurisdiction of that Act through interpretation of section 13 (b) (1) cuts down the jurisdiction of the Commission under section 204 of the Motor Carrier Act."

However, the Circuit Court of Appeals was in error in narrowly interpreting the exemption, thereby cutting down the Commission's jurisdiction, from which it follows that the criterion it used was without sound support, that is, the criterion that, in order that drivers be exempt from the Labor Standards Act and within the Commission's jurisdiction, it must be shown that a substantial part of their time was devoted to driving in interstate transportation.* Shorn of interpretations reached under the misconception that the remedial purpose of the Labor Standards Act must be looked to, the Commission's juris-

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*This criterion, it will be noted, is different from that held erroneous in the *Levinson* case, *supra*, namely, the criterion of whether an employee devotes a substantial part of his time to work affecting safety. Nevertheless, the criterion used by the court, adopted, as it was, in the view that the remedial purpose of the Labor Standards Act had to be given effect, is entirely without sound support and also runs counter to the rule that, in cases of conflicting State authority, federal authority is paramount.

diction to carry out Congress' legislation to promote safety on the highways is left to the language of that legislation and, in giving effect thereto, there seems no good reason why the authority with which it clothes the Commission should not be considered to be commensurate with the task the Commission must effectively carry out and the importance the Commission has always assigned to it, beginning with *Ex Parte MC–4*, 1 M. C. C. 1.

Although the greater part, or proportion, of petitioner's common carrier highway transportation is intrastate, its status as a carrier subject to the Act is not, and cannot be, disputed. The Commission's jurisdiction over traffic moving interstate does not depend on volume; for, as to the matters dealt with by the Act, the Act's jurisdiction and Commission authority thereunder is paramount. Accordingly, the least that can be said, it would seem, is that petitioner's trips, performed through its drivers, in interstate transportation over the highways, could not properly be disregarded because constituting a minor part of its total transportation or because not viewed by the court (in a particular case covering a particular period of time) as being of substantial volume. Each and all such trips in interstate highway transportation, and the drivers performing them, are definitely subject to the Act, even though, in conducting the business from

day to day coming to petitioner, there results a commingling of the use of drivers in intrastate, and interstate driving. Cf. *Ex. Parte No. MC–3*, 23 M. C. C. 1, 39.

DRIVER TRIPS

As explained in the preliminary statement (pp. 19–20, *supra*), the stipulated analyses of driver trips are, so far as the issue here is concerned, faulty in the respect that they have the effect of inflating the number, or percentage, of trips aligned under State authority and of diminishing the number, or percentage, of trips aligned under the Commission's authority. On the one side of the exhibits (R. 24–27) are shown the trips in transporting interstate freight and on the other the trips in performing so-called "interplant transportation," which later includes, not only the trips in transporting intrastate freight (Types A and D), but also the trips in performing plant service (Type B). The plant-service trips are not separately shown, but they appear to have constituted 35 percent of petitioner's total operations in 1941 (R. 12).

Plant service is not carrier transportation and, therefore, the trips in performing the same are not properly aligned (along with the intrastate highway trips) as subject to State legislation conferring authority on State Boards, or operating directly, as to the qualifications and or

maximum hours of service of the drivers of motor carriers operating on the public highways. Congress' legislation for promotion of highway safety is aimed, it is apparent, at that particular form of danger incident to the carriage of much of the country's commerce by motor carriers operating over the public highways.—The legislation implements its objective in important measure by clothing the Commission with authority over the qualifications and maximum hours of the motor carriers' drivers, and in the field thus occupied the federal legislation is paramount. Although plant service is private service, the Commission's authority over petitioner's drivers' qualifications and hours are within the power conferred.

In cases where the railroads, operating over plant tracks, perform plant service for shipper industries, the Commission is vested with authority to see to it that they exact proper and reasonable charges, this to prevent preferential service and rebating violative of the broad and important purposes of section 6 (7) of the Act and the Elkins Act to ensure uniformity of rates and to put a stop to inequality of treatment of whatsoever kind or sort. The Commission is enabled to act in the matter, not because the plant service is subject to its jurisdiction but through its authority over the carrier. Congress' legislation to promote safety on the public highways is certainly of equal importance and scope; and, simi-

larly in cases of plant service performed by motor carriers, the Commission is enabled to act in the premises, not because the plant service is subject to its jurisdiction, but through its authority to forbid the carriers to require or permit their drivers to work hours in excess of those ensuring that they will be in proper physical and mental condition when called upon to drive on the highways.

The effect of the alignment by the exhibits, as under State, instead of Commission, authority, of the 35 percent of petitioner's total 1941 operations consisting of plant service, or trips, is, of course, considerable. And this is not a matter solely of the number, or percent, of trips placed under State authority as compared with the number, or percent, thereof placed under Commission authority, but affects more importantly the showing made by Exhibit C–2 (R. 26–27) of the "percentage of weeks, by employees, in which the latter were exclusively engaged in "interplant transportation'." However, while it is entirely plain that the 35 percent of total trips in plant service should in some way be eliminated [9] from the State

[9] Exhibit C–2 shows (R. 16, 26–27) that all of petitioner's drivers except two "were exclusively engaged in 'interplant hauling' during the greater part (50 percent or more) of the workweeks in 1941." Since such "interplant hauling" is about 36.3 percent made up of hauling in performing plant service, it is evident that some adjustment must be made to confine the showing to highway hauling in the intrastate

authority side, it does not follow that they should be added to the Commission authority side as carrier trips in the transportation of interstate freight. For one thing, such trips, or movements in plant haulage, do not seem comparable to so-called road-haul trips in transporting freight and it is, of course, recognized that they are not trips affecting safety on the highways, save in the respect that excessive hours would affect such safety. Nevertheless, the Commission has full authority over the driver hours spent in plant haulage and that consideration should be kept in mind in any weighing of Federal and State authority.

But, even accepting Exhibit C–2 as it stands, it will be seen that, in 1941, all except 2 of the 43 drivers, made trips in transporting interstate freight and that those two were in the employ of

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transportation of freight. Fully appreciating that the result is but a rough approximation, the best that can be done with the material at hand is to reduce by 36.3 percent the percentage of weeks in which, as shown by the Exhibit, the drivers were exclusively engaged in "interplant transportation." Based on that adjustment, the showing is that about one-half of petitioner's drivers were exclusively engaged in the intrastate transportation of freight during 50 percent or more of the workweeks in 1941. Exhibit C–2 (R. 16, 27) also shows that the "average employee" was exclusively engaged in "interplant transportation" during 75.6 percent of the workweeks in 1941. If the 75.6 percent figure is reduced by 36.3 percent, the showing is that the "average employee" was exclusively engaged in intrastate transportation of freight 48.1 percent of the workweeks.

petitioner for only about half the year. The showing is by workweeks and, as to certain of the drivers, it is shown that there were a good many weeks in which they made one or more interstate trips; as to others the weeks shown are fewer and, taken as a whole, the showing is of a varying number of weeks during which the drivers made one or more interstate trips. From this and from the very handling of the exhibits and evidence, it is made plain that any of the drivers might, as need arose, be called on to drive in the transportation of interstate freight. The Act, of course, imposes no duty to assign particular drivers to interstate transportation but leaves the matter to managerial discretion save that they must be qualified and are subject to the prescribed maximum "on duty" hours. In this latter connection, it should be kept in mind that, as distinguished from the workweek used in the exhibits, the Commission uses the so-called "sliding week," that is, it "imposes on a 'driver' a maximum total of 60 hours of service 'on duty' of any kind in a 'week' of 168 consecutive hours" * * * *Levinson* case, *supra*, 675; *Ex Parte MC–2*, 6 M. M. C. 557, 563.

In *Ex Parte No. MC–3*, 23 M. C. C. 1, 39, the Commission said:

> We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The

same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week. * * *

We realize that there are other types of operations not specifically covered by what we have said above. We believe, however, that the principles herein referred to will make it less difficult for a private carrier to determine when a driver is subject to the regulations herein prescribed.

It will be seen from the above that the Commission, with the consideration fully in mind that a driver might, in the same week, drive both in interstate and intrastate transportation, yet found it necessary to conclude that, if a driver drove in interstate transportation at any time in a

given week he was subject to the Commission's regulations for the entire week. By this the Commission recognizes that, to effectively carry out Congress' legislation, it is necessary to trench on State authority to the extent stated and that the federal legislation is paramount. Whether in circumstances seeming to require a further extension of authority for effective administration, the Commission would rule that the matter was within its authority, counsel does not know. But, having in mind that the question of the scope of Commission authority under the legislation is a legal question for the Court, it is considered that the statute, as applying to the situation and circumstances in the present case, should be presented to the best of counsel's ability.

It is apparent from the evidence and exhibits that, without going beyond the Commission's ruling, the hours of service of petitioner's drivers and their qualifications would to a large extent be subject to the Commission's regulations. To that extent, whether constituting a minor or major extent, the regulations would at least have to be enforced. Yet, as very vividly portrayed by the analyses of the trips of petitioner's 43 drivers, and having in mind the "sliding week" used by the Commission and necessary to give effect to the safety legislation, the weeks as to which Commission authority over the various drivers attached and those as to which State authority attached,

and also the hours spent in plant service, would be so commingled that effective carrying out of the regulations and Congress' legislation would be impracticable except as authority was exerted over petitioner's drivers when driving intrastate. As said by this Court in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 588, and speaking of an analogous situation of commingled federal and State authority:

> Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them.

To the same effect see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119, 121; *Wickard* v. *Filburn*, 317 U. S. 111, 118, and *United States* v. *New York Central R. Co.*, 272 U. S. 457. In the latter case the Court said (p. 464):

> The Commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as "the Commission shall have

full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated" intended to confer upon the commission power to regulate the entire stream of commerce. Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. (Citing cases.) An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce, would make compliance with the commission's orders impossible and defeat the purpose of the Act.

In connection with the reference in the above to the broad language of the Act conferring authority on the Commission with respect to rail and barge connections, mention should be made of the similarly broad language of Section 204 of the Motor Carrier Act, conferring on the Commission authority over the qualifications and maximum hours of employees of motor carriers subject to the Act. And it is also true that Congress had particularly in mind the driver-employees of motor carriers. *Southland Co.* v. *Bayley*, 319 U. S. 44, 48; *U. S.* v. *Amer. Trucking Asso.*, 310 U. S. 534, 547. It will be noted, too, that, in the *Wisconsin Commission* case, *supra*, the fact is re-

ferred to that both interstate and intrastate passengers are carried in the same cars. Whether petitioner's vehicles at times carry both interstate and intrastate freight is not shown, but that that is very frequently true in cases of motor carriers operating both interstate and intrastate is well known and, where it is true, such situation, of course tends still further to confuse the question of Commission or State Board (or statute) authority over the drivers' hours and their qualifications as well. Cf. *Baltimore & O. R. R.* v. *Int. Com. Comm.*, 221 U. S. 612, 618, 619; *San Pedro, L. A. & S. L. R. Co.* v. *United States*, 213 Fed. 326, 328.[10]

In the two decisions last cited the highly remedial character of the Hours of Service Act is referred to and the fact that it should, therefore, be given liberal construction and application. In the *Levinson* case, *supra*, p. 658, 659, the Court emphasized that Congress' legislation for promotion of safety on the public highways was similarly highly remedial and, as demonstrating Congress' intention that it be given full scope, pointed to the fact that, while Section 203 of the Motor Carrier Act contained many exemptions from the Act's general provisions, it significantly in each case excepted the safety provisions from the ex-

[10] See *Southern Ry.* v. *R. R. Comm., Indiana*, 236 U. S. 439, and *U. S.* v. *Southern Ry.*, 222 U. S. 20, both relating to Safety Appliance Act.

emptions. Another thing showing Congress' intention that its safety legislation cover the widest field within its authority is that, while private carriers are not brought within the Act in other respects, the safety provisions are made applicable to them as well as common and contract carriers.

MECHANICS

The stipulation shows that during the regular course of its business in 1941, petitioner employed 14 garage workers, an unspecified number of which were mechanics (R. 11). The stipulation does not qualify the word "mechanics" and, therefore, the word, as used, must, it is believed, be taken to mean full-time mechanics. If, on the other hand, this view is wrong, the question of whether a substantial part of their activities affected safety would be important. *Levinson* case, *supra.* Since, however, in the latter case, a substantial part of Levinson's activities were shown to affect safety, the question was, it is understood, left open as to whether where some, but less than a substantial part, of an employee's activities affect safety, he is brought within the Commission authority and exempted from Section 7 of the Fair Labor Standards Act. *Pyramid Motor Corp* v. *Ispass,* 330 U. S. 695, 708–709.

The Circuit Court of Appeals has apparently disposed of the question of whether petitioner's

mechanics were exempt from Section 7 of the Labor Standards Act along with the drivers, that is, on the ground that a substantial part, or proportion, of their time was not devoted to work affecting interstate commerce. At least the Court does not discuss the status of the mechanics separately. But this treatment of the mechanics brings to mind the question of whether, if only a substantial part of the mechanic's activities affected safety, would it also have to be determined what proportion thereof affected interstate commerce. It is not believed that it would because the principles governing federal versus State authority are settled. But even assuming that the status of a part-time mechanic depends only on whether a substantial part of his activities are devoted to safety work, still the question of jurisdiction over him would be left to a criterion subject to varying interpretation, making for difficulty in administration and enforcement of the Act. As matter of historical usage under the Interstate Commerce Act, while as to questions of administrative judgment, Congress has used the criterion of "substantiality," questions of jurisdiction have been left to more definite tests. And, to consider that it has done so here, would, it is believed, be in accord with the decision in *Labor Board* v. *Fainblatt, supra.*

But, in any event, the stipulation, in using the word "mechanics," does not in any way qualify

the same. The Commission's report in *Ex Parte MC–2*, 28 M. C. C. 125, 138, shows that mechanics generally devote a large part of their time to activities directly affecting safety. The burden, it would seem, was on respondent to show that that was not the case as to the mechanics here. The Circuit Court of Appeals was wrong in its view that the exemption (sec. 13 (b) (1)) in the Fair Labor Standards Act should be narrowly construed and wrong, too, it is believed, in its holding that the burden was on petitioner to bring himself within the exemption.

Respectfully submitted.

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OCTOBER 1947.

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P. 7.
Rutledge J. p. 2

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

James F. Morris, Petitioner, v. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 17, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This case requires further application of the principles stated in *Levinson* v. *Spector Motor Service*, 330 U. S. 649, and *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695. The first question is whether the Interstate Commerce Commission has the power, under § 204 of the Motor Carrier Act, 1935,[1] to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce*, are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate com-*

[1] "Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. . . ." 49 Stat. 546, 49 U. S. C. § 304 (a) (1).

merce. The other question is whether, if the Commission has that power, the overtime requirements of § 7 of the Fair Labor Standards Act of 1938 [2] apply to such employees in view of the exemption stated in § 13 (b) (1) of that Act.[3] We hold that the Commission has the power in question and that the overtime requirements of § 7 of the Fair Labor Standards Act therefore do not apply to such employees.

This action was brought March 26, 1942, in the United States District Court for the Eastern District of Michigan by the Administrator of the Wage and Hour Division, United States Department of Labor, under § 17 of the Fair Labor Standards Act,[4] to enjoin the petitioner, James F. Morris, from violating § 15 (a) (1) and (2) of that

[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ." 52 Stat. 1063, 29 U. S. C. § 207 (a).

[3] "SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1).

[4] "SEC. 17. The district courts of the United States . . . shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15." 52 Stat. 1069, 29 U. S. C. § 217.

Act[5] through failure to pay his employees compensation for overtime in accordance with § 7 of that Act.[6] After a trial based on the pleadings and stipulated facts, the complaint was dismissed September 26, 1945. In its unreported conclusions of law the court stated that neither the petitioner nor his employees were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act and that, to the extent that they might be considered to be engaged "in commerce" within the meaning of that Act, the requirements of its § 7, as to compensation for overtime, did not apply to them. The Circuit Court of Appeals for the Sixth Circuit reversed this judgment May 29, 1946, and remanded the case for further proceedings. *Walling* v. *Morris*, 155 F. 2d 832. Because of its importance in interpreting the Motor Carrier Act and the Fair Labor Standards Act and because the question first stated above had not been passed upon in our decisions in the *Levinson* and *Pyramid* cases, *supra*, we granted certiorari, April 7, 1947, limited to the following question:

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[5] "SEC. 15. (a) . . . , it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14; . . . ." 52 Stat. 1068, 29 U. S. C. § 215.

[6] See note 2, *supra*.

"2. Where such employees [*i. e.*, those of a common carrier for hire who conducts a general cartage business] during a minority of their time are engaged in the transportation of interstate traffic are they exempt under the provisions of Section 13 (b) (1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U. S. C. sec. 301, et seq.)?"

In response to our invitation, the Interstate Commerce Commission filed a brief *amicus curiae*.

The material facts are treated by the parties as being those shown by the record to have been in effect when the complaint was filed in 1942. They may be summarized as follows:

The petitioner then was, and for the past 12 years had been, the sole owner and proprietor of the J. F. Morris Cartage Company which operated a general cartage business as a common carrier by motor vehicle in and about the metropolitan area of Detroit, Michigan, and all within three contiguous counties of that State. His operations were centralized at Ecorse, Michigan, at his garage and yard, used for a dispatching office, general maintenance and repair garage and storage space for equipment.

His principal business was the transportation of steel. In the regular course of his business, in 1941, he generally employed about 60 persons, 40 as truck drivers, 14 as mechanics, painters, washers and repairmen in the garage, three as dispatchers and three as general office workers. His equipment consisted of about 50 trucks or tractors and 60 trailers.

He was prepared to and did render general cartage service to the general shipping public. In 1941, he rendered such service to 47 consigning firms, but about 97% of his revenue came from the Great Lakes Steel Corporation and

the Michigan Steel Corporation, both in Ecorse. His general cartage services, in 1941, were made up of three intermingled types of service, generally classifiable as follows on the basis of the revenue derived from them: (1) 35%: Transportation of steel largely within steel plants. This was transported for further processing in those plants and an unsegregated portion of it was shipped ultimately in interstate commerce. (2) 61%: Transportation between steel mills and industrial establishments. These shipments consisted principally of bumper stock, fender stock and other types of steel used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce. (3) 4%: Transportation of miscellaneous freight directly in interstate commerce, either as part of continuous interstate movements or of interstate movements begun or terminated in metropolitan Detroit.[1]

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[1] This activity is described as follows:

"C. Approximately three (3) per cent of the defendant's operations consists of the transportation of freight between the plants of the Great Lakes Steel Corporation and the plants of the Michigan Steel Corporation on the one hand, and, on the other hand, interchange points, such as boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the defendant and such other interstate carriers. The defendant's compensation for his portion of the through transportation service is in some instances paid to him by the interstate carrier, the compensation representing a division of the through rates on the transportation movement, and other instances being compensated by the shipper."

"E. Approximately one (1) per cent of the defendant's operations consists of the transportation of miscellaneous freight in general

Ever since § 7 of the Fair Labor Standards Act took effect, October 24, 1938, petitioner's employees, with the exception of his office workers, consistently worked enough hours to entitle them to additional compensation at the rate of one and one-half times their regular wages if such Section were applicable to them. They were, however, paid on the assumption that the Section did not apply to them and, therefore, for the most part, received only their regular rate of pay for such overtime. Accordingly, if it is found that § 7 is applicable to them, there is ground for an injunction against its further violation. No issue is presented here as to the office workers because there is no proof of overtime services having been rendered by them or being now in prospect. No issue is presented here as to the dispatchers. The Circuit Court of Appeals held that § 7 applies to them as employees engaged in the production of goods for interstate commerce and that they are not exempt as administrative employees. Those issues, however, are not within the limited grant of certiorari. As to the garagemen and laborers, including mechanics, painters, washers and repairmen, together with their superintendent of maintenance, there is no issue presented here, except to the extent that such classifications include mechanics doing the class of work defined as that of "mechanics" in *Ex Parte No. MC-2*, 28 M. C. C. 125, 132, 133,[8] including

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cartage service for hire and for shippers other than Great Lakes Steel Corporation or Michigan Steel Corporation. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D above, except that it is done on behalf of and for the account of shippers other than Great Lakes Steel Corporation and Michigan Steel Corporation."

[8] "(1) *Mechanics and other garage workers.*—The evidence is clear that carriers that do not operate approximately 10 motor vehicles or more cannot economically employ mechanics to do repair work, and they do not do so. . . .

"The larger carriers, however, do employ mechanics whose primary duties are to keep the motor vehicles in a good and safe working

the making of mechanical repairs directly affecting the safe operation of motor vehicles. All of the garagemen and laborers, except their superintendent of maintenance, were paid for their overtime work at "straight" or regular hourly rates. He was paid a weekly wage, and received no overtime pay, although he devoted approximately 25% of his time to the performance of routine physical tasks of the same general character as those of the employees working under his direction. The Circuit Court of Appeals held that the superintendent of maintenance was

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condition. They are required, for example, to keep the lights and brakes in such condition. They perform many other duties, of course, but these are sufficient to show clearly that the duties of these employees do affect safety of operation directly, as it is obvious that a large motor vehicle without the required lights or adequate brakes is a great potential hazard to highway safety. All witnesses testifying at the hearing agreed that the work of mechanics has such a direct and intimate relation to safety of operation, and no conflicting evidence was submitted.

"Our conclusion is that mechanics devote a large portion of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a).

"There are other garage employees who do not perform work which affects safety of operation directly. Some carriers employ men who do nothing but paint vehicles. Others employ carpenters, and some few employ tarpaulin tailors. We find that the work done by none of these employees affects safety of operation.

"It is possible, although the record does not clearly establish the fact, that some of the larger carriers employ men whose sole duty is to see that the motor vehicles are properly supplied with oil, gas, and grease, or to wash the vehicles. In the majority of cases, undoubtedly, the mechanics perform this work. However, if there be employees who do nothing but oil, gas, grease, or wash the motor vehicles, we find that they do not perform duties which directly affect the safety of operation and are not subject to our jurisdiction. To make our finding in this regard entirely clear, it is that mechanics are the only garage workers we find subject to our jurisdiction." *Ex Parte No. MC-2*, 28 M. C. C. 125, 132, 133.

not exempt as an executive or administrative employee and should be classified in the same manner as the others in this group. There is nothing in the record showing the extent to which the respective garagemen and laborers devoted themselves to the several classes of work above mentioned and, if this were an action to recover overtime compensation for individual employees, it would be necessary to determine that fact. However, as this is an action only for an injunction relating to future practices, the situation can be met by limiting the injunction to the appropriate classifications of workers. On this basis, the injunction against violation of § 7 of the Fair Labor Standards Act may be issued as to those garagemen and laborers who are not "mechanics" as defined by the Interstate Commerce Commission, and the issue before us is limited to the proper application of such an injunction to such "mechanics."

The drivers are full-time drivers of motor vehicles well within the definition of that class of work by the Commission if the work is done in interstate commerce.[9] From October 24, 1938, to August 1, 1940, the drivers received their "straight" or regular hourly rate of pay for all overtime work. Since August 1, 1940, their overtime work has been paid for in accordance with a collective bargaining agreement in force as to union drivers, throughout metropolitan Detroit, employed either in intrastate or interstate general cartage. From August 1, 1940, to August 1, 1941, these agreements required payment of overtime in excess of 52 hours a week at one and one-half times the regular rate. After August 1, 1941, as a concession to wartime conditions, this additional rate was applied only to overtime in excess of 54 hours a week. The statutory workweek which would be applicable under § 7 of the Fair Labor Standards Act

[9] Safety Regulations (Carriers by Motor Vehicle), 49 CFR Cum. Supp., Parts 190–193.

at all times has been substantially shorter than those just mentioned.[10]

As to these drivers and these "mechanics" whose work affects safety of transportation, the first question here, as in the *Levinson* case, is whether the Commission has the power, under § 204 of the Motor Carrier Act, to establish qualifications and maximum hours of service with respect to them. The special situation presented is that, on the average, only about 4% of their time and effort has been, or is likely to be, devoted to services in interstate commerce. The issue would appear in its simplest form if each driver were required, each day, to devote 24 minutes (*i. e.*, 4% of his allowable daily aggregate of ten hours driving time) to driving in interstate commerce. The question then would be whether the Commission has the power to establish his qualifications and maximum hours of service in view of the relation of this driving to safety of operation in interstate commerce. Under the tests of the Commission's power, as approved in both the majority and minority opinions in the *Levinson* case, and, under the analysis of that power developed by the Interstate Commerce Commission and cited in that case, it is "the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment."[11] It is beyond question that, under such circumstances, § 204 (a) (1) of the Motor

[10] See note 2, *supra*.

[11] *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 674–675.

"For, factually speaking, not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one." *Id.*, dissenting opinion, at p. 687.

Carrier Act [12] has authorized the Commission to establish reasonable requirements with respect to qualifications and maximum hours of service of such drivers. The Fair Labor Standards Act, which was passed three years later, has recognized and does not restrict the Commission's power over the safety of operation under the Motor Carrier Act. What is thus true for the driver is true also for the mechanic who repairs his truck.

In the record before us, instead of 4% of the driving time of each driver being devoted each day to interstate commerce without relation to what the driver does at other times, the parties present the actual experience of the petitioner and his drivers throughout 1941. The printed record, together with an unprinted exhibit filed with the Clerk, classifies all of the 19,786 trips taken in 1941 by the 43 drivers who respectively drove motor vehicles for the petitioner during not less than eight weeks in that year. Only the "Pickup Trips" and "Boat Dock Trips" are counted as being in "interstate commerce." These involved movements of goods to or from railroad freight houses, line haul motor carrier depots or the boat docks of the several steamship companies in Detroit. It was stipulated that the petitioner was "engaged as a common carrier for hire in the local transportation of property by motor vehicle," was "engaged in a general cartage business and . . . [was] prepared to render such services to the general shipping public." Each driver appears to have been a full-time driver during each week that he worked. The tables show 464 "Pickup Trips" and 260 "Boat Dock Trips," or a total of 724 made in interstate commerce, when and as required by petitioner's consignors. These constituted 3.65% of the petitioner's total trips. They were not distributed equally to each driver nor on the basis of 4% of his time each day. However, apparently in the normal operation of the business, these

[12] See note 1, *supra*.

strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. These trips were thus a natural, integral and apparently inseparable part of the common carrier service of the petitioner and of his drivers.

One or more such trips were taken by one or more drivers each week. The average number of drivers making one or more such trips in each week was nine drivers out of 37, or 24.4%. There were six weeks in which more than half of the drivers thus engaged directly in interstate commerce. The highest percentage of drivers making such trips in one week was 78.1%, when 25 drivers, out of the 32 then on duty, did so. As to the distribution of such trips, throughout the year, among the total of 43 drivers, every driver, except two, made at least one such trip with interstate freight. Each of the two who failed to make any such trip was employed for only about one-half the year and that was during the months when the trips in interstate commerce were the less frequent. On the other hand, one driver made 97 such trips in interstate commerce. Another made 52 and the average per driver was over 16. The greatest number of such trips made by a single driver in a single week was seven out of nine. In several other weeks he made six such trips out of a total of seven in the week. The net result is a practical situation such as may confront any common carrier engaged in a general cartage business, and who is prepared and offering to serve the normal transportation demands of the shipping public in an industrial metropolitan center. From the point of view of safety in interstate commerce, the hazards are not distinguishable from those which would be presented if each driver drove 4% of his driving time each day in interstate commerce. In both cases there is the same essential need for the establishment of reason-

able requirements with respect to qualifications and maximum hours of service of employees. If the common carrier is required, by virtue of that status, to take this interstate business he must perform the required service in accordance with the requirements established by the Commission. The Commission has made no exception in these qualifications and maximum hours of service that would exempt the drivers of the petitioner from them as a class. The applicability of the Commission's present requirements as to specific drivers during specific weeks is not the issue before us. We hold that the Commission has the *power* to establish qualifications and maximum hours of service, pursuant to the provisions of § 204 of the Motor Carrier Act, for the entire classification of petitioner's drivers and "mechanics" and it is the existence of that power (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not § 7 of the Fair Labor Standards Act is applicable to these employees.[13]

[13] "We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations *herein prescribed* during that week. *We express no opinion as to whether or not during that week the driver is subject to the provisions of section 7 of the Fair Labor Standards Act.*" (Italics supplied.) *Ex Parte No. MC-3*, 23 M. C. C. 1, 39.

The above statement demonstrates the Commission's opinion as to its power to establish qualifications and maximum hours of service in

Congress has gone out of its way to make this purpose clear in cases comparable to the one before us. It has done this by making the power of the Commission, under § 204 of the Motor Carrier Act, expressly applicable to motor vehicle pickup and delivery service within terminal areas[14] to transportation in interstate commerce wholly within a metropolitan area,[15] and to casual, occa-

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the field of mixed interstate and intrastate transportation. The rules that it has prescribed have not extended to its full power to make rules in this field. The fact that this statement was made in 1940, three years before the decision of this Court in *Southland Co. v. Bayley*, 319 U. S. 44, explains the express reservation made as to the Commission's opinion relating to the effect of the scope of its unexercised powers under § 204 of the Motor Carrier Act in relation to § 7 of the Fair Labor Standards Act. For the Commission's regulations of Hours of Service (Carriers by Motor Vehicle) see 49 CFR Cum. Supp., Part 191.

[14] "SEC. 202. . . .

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; . . . ." § 202 (c) (1), 49 Stat. 543, as amended by 56 Stat. 300, 49 U. S. C. Supp. V, § 302 (c) (1).

[15] "SEC. 203. . . .

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce

sional, or reciprocal transportation of property in interstate commerce by any person not engaged in transportation by motor vehicle as a regular occupation or business.[16] It has made the Commission's power over safety requirements expressly applicable to these operations, even though, at the same time, Congress has exempted them from general regulatory control.

Congress furthermore has provided a special procedure by which, in an appropriate case, an *intrastate motor carrier* or any other party in interest, may secure the general exemption of such a carrier from compliance with the Motor Carrier Act even though such carrier does perform some interstate transportation. Congress, however, expressly has authorized the Commission, and not the courts, to decide when the case is an appropriate one for such a general exemption.[17] It does not appear that

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is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." 49 Stat. 545–546, 49 U. S. C. § 303 (b) (8) and (9).

[16] See note 15, *supra*.

[17] SEC. 204 (a) It shall be the duty of the Commission—

. . . . . .

"(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall

any such certificate of exemption has been obtained or sought as to this petitioner.

Having determined that the Commission has the power to establish qualifications and maximum hours of service for these drivers and "mechanics" under § 204 of the Motor Carrier Act, the question recurs as to whether, in the face of the exemption stated in § 13 (b) (1) of the Fair Labor Standards Act, the requirements of § 7 of that Act nevertheless apply to these employees. This issue as to the possible reconciliation of the language of these Acts so as to provide for concurrent jurisdiction was considered at length in the *Levinson* case and the conclusion was there reached that such a construction was not permissible.

This discussion has proceeded on the basis of the facts which were stipulated to exist in 1942. This treatment, however, should not be interpreted as necessarily restricting the District Court to the present record if, for good cause, that court finds it advisable to consider additional evidence or to retry the case *de novo*.

For these reasons, the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court for further proceedings consistent with the opinion of the Circuit Court of Appeals, as here modified.

It is so ordered.

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attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. . . ." 49 Stat. 546, as amended by 54 Stat. 921, 49 U. S. C. § 304 (a) (4a).

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

James F. Morris, Petitioner, v. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 17, 1947.]

Mr. Justice Murphy, with whom Mr. Justice Black and Mr. Justice Douglas concur, dissenting.

Apart from § 13 (b) (1), it is clear that petitioner's truck drivers and mechanics are subject to the wage and hour provisions of the Fair Labor Standards Act. They spend virtually all of their time in transportation activities which are an integral part of the production of goods for interstate commerce. *Walling* v. *Comet Carriers*, 151 F. 2d 107. The issue thus becomes one of determining whether these employees are plainly and unmistakably within the terms and spirit of the § 13 (b) (1) exemption, giving due regard to the rule that exemptions from the operation of humanitarian legislation are to be narrowly construed. *Phillips Co.* v. *Walling*, 324 U. S. 490, 493.

By a pedantically literal reading of § 13 (b) (1), it is possible to say that these employees are among those as to whom the Interstate Commerce Commission has "power" to establish qualifications and maximum hours of service. A sporadic and minute portion of their activities, approximating 3% to 4% of the total, affects the safety of operation of trucks in interstate commerce. The Commission's power under § 204 (a) of the Motor Carrier Act is confined to regulation of transportation in interstate and foreign commerce; and its jurisdiction over

employees' activities is limited to those which affect the safety of operation of motor vehicles engaged in such transportation. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534. Hence the potential scope of the Commission's "power" over petitioner's employees is extremely narrow. Approximately 97% of their activities are beyond the jurisdiction of the Commission. Yet it is by the slender thread of this "power" that they fall within § 13 (b) (1) and hence are deprived of the benefits of the Fair Labor Standards Act.

Due respect for the legislative purpose militates against such a result. We are dealing here with a statute that is dedicated to the proposition that laboring men are to be treated as something more than chattels. And their statutory rights are not to be discarded by adherence to formalistic dogmas of interpretation. Section 13 (b) (1) is not just an exercise in grammar. It is part of the living fiber embodying the rights of those who labor for others. It must be read and interpreted in the light of reason and in the light of the aims which Congress sought to achieve.

When that is done, it becomes clear that when § 13 (b) (1) speaks of those over whom the Interstate Commerce Commission has "power" it means those who perform at least a substantial amount of activities within the Commission's jurisdiction. Congress was not concerned with insignificant conflicts between Fair Labor Standards Act regulations and Interstate Commerce Commission regulations. Nor was it desirous of leaving unregulated nearly all of the working time of those who are engaged in the production of goods for commerce but who spend infinitesimal amounts of time directly in interstate transportation. In other words, engaging in an occasional and microscopic amount of activities affecting safety of operation should no more exclude employees from the Act than sporadically shipping insubstantial

amounts of goods in interstate commerce should bring those engaged in such shipments within the purview of the Act. See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181. That was implicitly recognized by the Court in *Pyramid Motor Corp.* v. *Ispass*, 330 U. S. 695, 708, and I had not supposed until now that that case or *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, justified any other result.

Interpreting § 13 (b) (1) in disregard of reality only acts as an open invitation to evade the Act and to destroy the statutory rights of those trucking concern employees who now perform no activities which affect the safety of operations. All that the employer need do to withdraw the benefits of the Act from these employees is to send them occasionally to a terminal to pick up or deliver a piece of interstate freight. They then fall into the "power" of the Interstate Commerce Commission and automatically lose their rights under the Fair Labor Standards Act. I accordingly dissent.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

James F. Morris, Petitioner, v. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 17, 1947.]

Mr. Justice Rutledge, dissenting.

But for this Court's decisions in the *Levinson* and *Ispass* cases, my views in this case would be in substantial accord with those expressed by Mr. Justice Murphy. See *Levinson* v. *Spector Motor Service*, 330 U. S. 649, dissenting opinion at 685; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695. I thought the decisions in those cases foreshadowed the extreme result here, which goes so far as to exclude from the Fair Labor Standards Act's protection at least two employees who made no trips in what petitioner regards as the interstate phase of his business. While on the other hand one driver made 97 such trips, there were others who made only very occasional ones.

Although I regarded the *Levinson* and *Ispass* decisions as foreshadowing and perhaps concluding any situation where the employee's work would substantially affect safety in interstate operations, and thus as going to the extent of exempting from Fair Labor Standards Act coverage any employee whose work substantially affects such safety, I did not understand that all employees driving for a company engaged principally in intrastate commerce but doing a very small amount of interstate commerce would be lumped together, for purposes of the exclusion, on the basis of the proportionate amounts of work done by the company in those phases of its business. That

I think is the effect of the present decision. To that extent, I also think the ruling constitutes an extension of the exemption beyond that sustained in the *Levinson* and *Ispass* cases.

On the basis of the decision last term in *United States* v. *Yellow Cab Company*, 332 U. S. 218, I also have difficulty with the view that any of the carrier's services here were rendered in interstate commerce. That decision held that the transportation in Chicago of passengers and their luggage from their homes, offices, hotels, etc. to railroad stations for the purpose of boarding trains on interstate journeys, and conversely the like use of taxicabs in the reverse direction after leaving trains on arrival in Chicago following such journeys, were "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." 332 U. S. at 230. While I was not in agreement with the *Yellow Cab* decision, the same ruling, if applied to the facts here, would make the so-called "interstate commerce," *i. e.*, the transportation of freight from petitioner's customers' places of business to shipping terminals, intrastate rather than interstate commerce.[1]

I am unable to agree with the Court's opinion.

[1] I do not read the stipulation of facts in this case as showing that petitioner engaged in transportation from terminal to terminal.